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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CARLOS CRUZ-SANCHEZ, Defendant.	Criminal Case No. 08CR2025-DMS Date: August 15, 2008 Time: 11:00 am GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS TO: (1) PRODUCE DISCOVERY; (2) DISMISS INDICTMENT DUE TO FAILURE TO PROPERLY ALLEGE AN OFFENSE; (3) DISMISS INDICTMENT DUE TO MISINSTRUCTION OF THE GRAND JURY; AND (4) FILE FURTHER MOTIONS.

COMES NOW, the plaintiff, UNITED STATES OF AMERICA, by and through its counsel Karen P. Hewitt, United States Attorney, and A. Dale Blankenship, Assistant United States Attorney, hereby files its Response and Opposition to the motions filed on behalf of Carlos Cruz-Sanchez ("Defendant"). This Response and Opposition is based upon the files and records of this case.

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I

STATEMENT OF THE CASE

On June 18, 2008, a federal grand jury in the Southern District of California returned a one-count Indictment charging Defendant as a deported alien found in the United States, in violation of Title 8, United States Code, Section 1326(a) and (b). Defendant was arraigned on the Indictment on June 20, 2008, and entered a not guilty plea.

II

STATEMENT OF FACTS

A. INSTANT OFFENSE

On May 6, 2008, United States Border Patrol Agent Tito Barrientos was performing line watch duties in the El Centro Border Patrol Station area of responsibility. At approximately 6:20 a.m., a remote video surveillance system ("RVSS") operator informed Agent Barrientos that an individual climbed over the international boundary fence in an area known as "Diamond's Truck Lot," which is located approximately .3 miles west of the Calexico, California, West Port of Entry. Agent Barrientos responded to the area and encountered an individual, later identified as Defendant, Carlos Cruz-Sanchez, next to the boundary fence.

Agent Barrientos approached Defendant and identified himself as a United States Border Patrol Agent. As Agent Barrientos approached Defendant, he began climbing the fence, back toward Mexico. Agent Barrientos informed Defendant that Mexicali, Mexico police officers were on the other side. Defendant saw the Mexican police officers and climbed back down the fence. Defendant then told Agent Barrientos that he was not doing anything wrong. Agent Barrientos then asked Defendant his country of citizenship and whether he had documents to enter the United States. Defendant responded that he was a citizen of Mexico without documents to enter the United States. Agent Barrientos placed Defendant under arrest and transported him to the El Centro Border Patrol Station for processing.

At the station, Agent Barrientos conducted a Department of Homeland Security records check. The records check revealed that Defendant had a lengthy criminal and immigration record.

Agents advised Barrientos of his Miranda rights and Defendant invoked.

B. DEFENDANT'S CRIMINAL HISTORY

On March 10, 1995, Defendant was convicted in Washington Superior Court for solicitation to deliver a controlled substance in violation of Washington Revised Code § 69.50.401(a)(1)(iii), and he was sentenced to 16 months' custody. On September 2, 1996, Defendant was convicted in Washington Superior Court for unlawful solicitation to deliver a controlled substance in violation of Washington Revised Code § 69.50.401(a)(1)(iii), and he was sentenced to 31 months' custody. On March 12, 1998, Defendant was convicted in Oregon Superior Court of delivery of a controlled substance in violation of Oregon Revised Statute § 475.992 And sentenced to 18 months' custody. On October 7, 1999, Defendant was convicted in the United States District Court, District of Oregon, for being a deported alien found in the United States in violation of 8 U.S.C. § 1326 and he was sentenced to 21 months' custody.

C. DEFENDANT'S IMMIGRATION HISTORY

Defendant has been ordered removed from the United States by an immigration judge on at least two occasions, August 25, 1995, and October 23, 1996. Defendant was mostly recently removed from the United States on April 22, 2008.

III

DISCUSSION

A. THE GOVERNMENT WILL COMPLY WITH ALL DISCOVERY OBLIGATIONS

The United States has and will continue to fully comply with its discovery obligations under Brady v. Maryland, 373 U.S. 83 (1963), the Jencks Act (18 U.S.C. § 3500), and Rule 16 of the Federal Rules of Criminal Procedure.[1/] To date, the United States has produced 160 pages of discovery to Defendant's counsel including investigative reports and a DVD copy of the videotape recording of Defendant's Miranda advisal and post-Miranda statement (Defendant invoked). A copy of the audiotape of Defendant's deportation hearing has been ordered and will be produced to

[1/] Unless otherwise noted, all references to "Rules" refers to the Federal Rules of Criminal Procedure.

Defendant upon receipt. In addition Government counsel will inform defense counsel when the A-file has been received and defense counsel will be given an opportunity to review the A-file at a time convenient to both parties and the custodian agency. As of today, the United States has received no reciprocal discovery. The Government anticipates that all discovery issues can be resolved amicably and informally, and requests that no order be entered compelling specific discovery in light of the Government's position below.

1. Defendant's Statements

The United States recognizes its obligation under Rules 16(a)(1)(A) and 16(a)(1)(B) to provide to Defendant his written statements and the substance of Defendant's oral statements. The United States has produced all of Defendant's statements that are known to the undersigned Assistant U.S. Attorney at this time. If the United States discovers additional oral or written statements that require disclosure under the relevant Rules, such statements will be promptly provided to Defendant.

2. Arrest Reports

The United States does not object to this request and has already produced to Defendant all arrest reports known to the Government at this time.

3. Prior Record

The United States has provided Defendant with a copy of his known prior criminal record under Rule 16(a)(1)(D). See United States v. Audelo-Sanchez, 923 F.2d 129, 130 (9th Cir. 1990). Should the United States determine that there are any additional documents pertaining to the Defendant's prior criminal record, those will be promptly provided to Defendant.

4. Evidence Seized

The United States has complied and will continue to comply with Rule 16(a)(1)(E) in allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy all evidence seized that is within its possession, custody, or control, and that is either material to the preparation of Defendant's defense or is intended for use by the United States as evidence during its case-in-chief at trial, or was obtained from or belongs to Defendant.

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5. Tangible Objects

The United States has complied and will continue to comply with Rule 16(a)(1)(E) in allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy tangible objects that are within its possession, custody, or control, and that is either material to the preparation of Defendant's defense or is intended for use by the United States as evidence during its case-in-chief at trial, or was obtained from or belongs to Defendant. The United States, however, need not produce rebuttal evidence in advance of trial. See United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984).

6. Preservation of Evidence

As stated above, the United States will preserve all evidence to which the Defendant is entitled pursuant to the relevant discovery rules.

7. Reports of Examinations and Tests

The United States will provide Defendant with any scientific tests or examinations in accordance with Rule 16(a)(1)(F).

8. Expert Witnesses

The United States will comply with Rule 16(a)(1)(G) and provide Defendant with a written summary of any expert testimony that the United States intends to use during its case-in-chief at trial under Federal Rules of Evidence 702, 703 or 705.

9. Brady Material

The United States has complied and will continue to comply with its discovery obligations under Brady v. Maryland, 373 U.S. 83 (1963).

10. Giglio Material

The United States has complied and will continue to comply with its discovery obligations under Giglio v. United States, 405 U.S. 150 (1972).

11. Henthorn Material

The United States will comply with its obligations under United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991), and request that all federal agencies involved in the criminal investigation and prosecution review the personnel files of the federal law enforcement inspectors, officers, and special agents whom the United States intends to call at trial and disclose information favorable to the defense that meets the appropriate standard of materiality. United States v. Booth, 309 F.3d 566, 574 (9th Cir. 2002) (citing United States v. Jennings, 960 F.2d 1488, 1489 (9th Cir. 1992)). If the undersigned Assistant U.S. Attorney is uncertain whether certain incriminating information in the personnel files is "material," the information will be submitted to the Court for an in camera inspection and review.

12. Jencks Act Material

The United States will comply with its discovery obligations under the Jencks Act, Title 18, United States Code, Section 3500, and as incorporated in Rule 26.2.

13. Cooperating Witnesses

At this time, the United States is not aware of any confidential informants or cooperating witnesses involved in this case. The Government must generally disclose the identity of informants where: (1) the informant is a material witness, and (2) the informant's testimony is crucial to the defense. Roviaro v. United States, 353 U.S. 53, 59 (1957). If there is a confidential informant involved in this case, the Court may, in some circumstances, be required to conduct an in camera inspection to determine whether disclosure of the informant's identity is required under Roviaro. See United States v. Ramirez-Rangel, 103 F.3d 1501, 1508 (9th Cir. 1997). If the United States determines that there is a confidential informant or cooperating witness involved in this case, the United States will either disclose the identity of the informant or submit the informant's identity to the Court for an in camera inspection.

14. 404(b) Material

The United States will disclose, in advance of trial, the general nature of any "other bad acts" evidence that the United States intends to introduce at trial pursuant to Federal Rule of Evidence 404(b).

15. Witnesses

The United States will provide a list of witnesses in its trial memorandum. The grand jury transcript of any person who will testify at trial will also be produced.

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16. Alien File

The United States will make Defendant's A-file available for inspection at a time mutually convenient to the parties and will continue to perform its duty under Brady and the discovery rules to disclose all material exculpatory information or evidence favorable to Defendant that is contained in the A-File. The documents in the A-File are not exculpatory. Most of the documents are highly incriminating in nature. The documents include numerous documents related to Defendant's immigration history and his criminal history. The documents establish that Defendant is an illegal alien with a felony criminal record who has been legally deported, removed from the United States, admonished of the criminal sanctions under 8 U.S.C. § 1326, and, despite the prior warnings, subsequently reentered the United States without applying for permission. The Government will provide all documents that fall within the scope of Rule 16.

B. THE INDICTMENT PROPERLY ALLEGES AN OFFENSE

Defendant first contends that the Indictment should be dismissed, because it charges in the disjunctive. Specifically, Defendant complains of the language relating to the element of the defendant re-entering without permission: ". . . **without the Attorney General of the United States or his designated successor**, the Secretary of the Department of Homeland Security . . . having expressly consented to the defendant's reapplication for admission into the United States . . ." Since this language clearly conveys the fact that Defendant was guilty of the crime of Illegal Re-entry only if he failed to receive the permission of the appropriate government authority, the Indictment is sufficient and should not be dismissed.

The Federal Rules of Criminal Procedure require that an indictment be a "plain, concise and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). "An indictment must be read in its entirety and construed in accord with common sense and practicality." United States v. Alber, 56 F.3d 1106 (9th Cir. 1995) (citation omitted). A legally sufficient indictment must state the elements of the offense charged with sufficient clarity to apprise defendants of the charge against which they must defend and to enable them to plead double jeopardy. United States v. Hinton, 222 F.3d 664, 672 (9th Cir. 2000) (citation omitted). "Further, the test of sufficiency of the indictment is not whether it could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards." Id. (citing United States v. Rosi, 27 F.3d 409, 415 (9th Cir. 1994)).

Here the language in the Indictment – which is the identical language used in every prosecution under 8 U.S.C. § 1326 in this District – apprises Defendant of the crime charged with sufficient clarity to allow him to plead double jeopardy in the future. The element of the offense regarding the Defendant's failure to seek permission from the appropriate government authority is also sufficiently clear. A common sense reading of this language indicates that a previously deported alien must obtain the consent of the appropriate government official (the Attorney General or his designated successor) before re-entering the United States. In addition, the Indictment indicates that the Attorney General's "designated successor" is defined at 6 U.S.C. §§ 202(3) and (4) and 557. These statutes make clear that beginning on January 24, 2003, the immigration enforcement functions previously handled by the Attorney General are transferred to the Secretary of the Department of Homeland Security.

Defendant's argument has been previously considered, and rejected, by a court of this District. In the case of United States v. Vega-Guerrero, No. 05CR2069 (S.D. Cal. Mar. 7, 2006) the Honorable John S. Rhoades, Sr., issued a written order rejecting Defendant's contention that an identically worded indictment was flawed. [Appendix 5.] The court determined that the indictment was not plead in the disjunctive and further that the relevant time period during which the Attorney General and the Secretary of the Department of Homeland Security were charged with enforcement of the immigration laws is not an element of § 1326. Defendant's motion should be denied.

C. THE GRAND JURY INSTRUCTIONS WERE CORRECT, AND THE INDICTMENT SHOULD NOT BE DISMISSED

The Honorable John A. Houston and the Honorable Barry Ted Moskowitz have both issued a detailed Order analyzing and rejecting all of the arguments Defendant raises here. See Order of Judge Moskowitz, attached as Appendix 3; and Order of Judge Houston attached as Appendix 4. The United States adopts the reasoning in Judge Moskowitz' previous order and requests that this Court reach the same result. Attached as Appendix 1 is the "Partial Transcript" of the Grand Jury

Proceedings. Attached as Appendix 2 is the redacted "Supplemental Transcript" which records the relevant portions of the voire dire proceedings.

This Court, and other courts of this district, have repeatedly rejected the arguments raised by Defendant before, and we ask the Court to do so again.

D. LEAVE TO FILE FURTHER MOTIONS

The United States does not oppose Defendant's request for leave to file further motions, so long as such motions are based on discovery previously unavailable to Defendant.

VI

CONCLUSION

For the foregoing reasons, the United States requests that the Court deny Defendant's Motions, except where unopposed.

Dated: August 8, 2008.

Respectfully Submitted,

KAREN P. HEWITT
United States Attorney

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CARLOS CRUZ-SANCHEZ, Defendant.	Criminal Case No. 08CR2025-DMS **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED THAT:

I, A. DALE BLANKENSHIP, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS:**

1. PRODUCE DISCOVERY;
2. DISMISS INDICTMENT DUE TO FAILURE TO PROPERLY ALLEGE AN OFFENSE;
3. DISMISS INDICTMENT DUE TO MISINSTRUCTION OF THE GRAND JURY; AND
4. FILE FURTHER MOTIONS

on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

David J. Zugman, Esq.
dzugman@burchamzugman.com

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 8, 2008.

s/ A. Dale Blankenship
A. DALE BLANKENSHIP

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United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CARLOS CRUZ-SANCHEZ, Defendant.	Criminal Case No. 08CR2025-DMS **TABLE OF CONTENTS FOR APPENDIX FOR GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS**

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Appendix 1: Grand Jury Instructions

Appendix 2: Grand Jury Voir Dire Transcript

Appendix 3: Judge Moskowitz Order

Appendix 4: Judge Houston Amended Order

Appendix 5: Order Denying Motion to Dismiss

Dated: August 8, 2008.

Respectfully Submitted,

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APPENDIX 1

Grand Jury Instructions

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE: THE IMPANELMENT)
OF GRAND JURY PANELS 07-1 AND)
07-2)

BEFORE THE HONORABLE LARRY ALAN BURNS

UNITED STATES DISTRICT JUDGE

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, JANUARY 11, 2007

COURT REPORTER: EVA OEMICK
OFFICIAL COURT REPORTER
UNITED STATES COURTHOUSE
940 FRONT STREET, STE. 2190
SAN DIEGO, CA 92101
TEL: (619) 615-3103

SAN DIEGO, CALIFORNIA-WEDNESDAY, JANUARY 11, 2007-9:30 A.M.

THE COURT: LADIES AND GENTLEMEN, YOU HAVE BEEN SELECTED TO SIT ON THE GRAND JURY. IF YOU'LL STAND AND RAISE YOUR RIGHT HAND, PLEASE.

MR. HAMRICK: DO YOU, AND EACH OF YOU, SOLEMNLY SWEAR OR AFFIRM THAT YOU SHALL DILIGENTLY INQUIRE INTO AND MAKE TRUE PRESENTMENT OR INDICTMENT OF ALL MATTERS AND THINGS AS SHALL BE GIVEN TO YOU IN CHARGE OR OTHERWISE COME TO YOUR KNOWLEDGE TOUCHING YOUR GRAND JURY SERVICE; TO KEEP SECRET THE COUNSEL OF THE UNITED STATES, YOUR FELLOWS AND YOURSELVES; NOT TO PRESENT OR INDICT ANY PERSON THROUGH HATRED, MALICE OR ILL WILL; NOR LEAVE ANY PERSON UNREPRESENTED OR UNINDICTED THROUGH FEAR, FAVOR, OR AFFECTION, NOR FOR ANY REWARD, OR HOPE OR PROMISE THEREOF; BUT IN ALL YOUR PRESENTMENTS AND INDICTMENTS TO PRESENT THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, TO THE BEST OF YOUR SKILL AND UNDERSTANDING?

IF SO, ANSWER, "I DO."

(ALL GRAND JURORS ANSWER AFFIRMATIVELY)

THE COURT: ALL JURORS HAVE TAKEN THE OATH AND ANSWERED AFFIRMATIVELY.

IF YOU'LL HAVE A SEAT. WE ARE NEARLY COMPLETED WITH THIS PROCESS.

I AM OBLIGATED BY THE CONVENTION OF THE COURT AND THE LAW OF THE UNITED STATES TO GIVE YOU A FURTHER CHARGE REGARDING YOUR RESPONSIBILITY AS GRAND JURORS. THIS WILL

APPLY NOT ONLY TO THOSE WHO HAVE BEEN SWORN, BUT THE REST OF YOU WHOSE NAMES HAVE NOT YET BEEN CALLED, YOU ARE GOING TO BE PUT IN RESERVE FOR US.

AND IF DISABILITIES OCCUR -- I DON'T MEAN IN A PHYSICAL SENSE, BUT PEOPLE MOVE OR SITUATIONS COME UP WHERE SOME OF THE FOLKS THAT HAVE BEEN SWORN IN TODAY ARE RELIEVED, YOU WILL BE CALLED AS REPLACEMENT GRAND JURORS. SO THESE INSTRUCTIONS APPLY TO ALL WHO ARE ASSEMBLED HERE TODAY.

NOW THAT YOU HAVE BEEN IMPANELED AND SWORN AS A GRAND JURY, IT'S THE COURT'S RESPONSIBILITY TO INSTRUCT YOU ON THE LAW WHICH GOVERNS YOUR ACTIONS AND YOUR DELIBERATIONS AS GRAND JURORS.

THE FRAMERS OF OUR FEDERAL CONSTITUTION DETERMINED AND DEEMED THE GRAND JURY SO IMPORTANT TO THE ADMINISTRATION OF JUSTICE THAT THEY INCLUDED A PROVISION FOR THE GRAND JURY IN OUR BILL OF RIGHTS.

AS I SAID BEFORE, THE 5TH AMENDMENT TO THE UNITED STATES CONSTITUTION PROVIDES, IN PART, THAT NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL OR OTHERWISE INFAMOUS CRIME WITHOUT ACTION BY THE GRAND JURY.

WHAT THAT MEANS IN A VERY REAL SENSE IS YOU'RE THE BUFFER BETWEEN THE GOVERNMENT'S POWER TO CHARGE SOMEONE WITH A CRIME AND THAT CASE GOING FORWARD OR NOT GOING FORWARD.

THE FUNCTION OF THE GRAND JURY, IN FEDERAL COURT AT LEAST, IS TO DETERMINE PROBABLE CAUSE. THAT'S THE SIMPLE

FORMULATION THAT I MENTIONED TO A NUMBER OF YOU DURING THE JURY SELECTION PROCESS. PROBABLE CAUSE IS JUST AN ANALYSIS OF WHETHER A CRIME WAS COMMITTED AND THERE'S A REASONABLE BASIS TO BELIEVE THAT AND WHETHER A CERTAIN PERSON IS ASSOCIATED WITH THE COMMISSION OF THAT CRIME, COMMITTED IT OR HELPED COMMIT IT.

IF THE ANSWER IS YES, THEN AS GRAND JURORS YOUR FUNCTION IS TO FIND THAT THE PROBABLE CAUSE IS THERE, THAT THE CASE HAS BEEN SUBSTANTIATED, AND IT SHOULD MOVE FORWARD. IF CONSCIENTIOUSLY, AFTER LISTENING TO THE EVIDENCE, YOU SAY "NO, I CAN'T FORM A REASONABLE BELIEF EITHER THAT A CRIME WAS COMMITTED OR THAT THIS PERSON HAS ANYTHING TO DO WITH IT, THEN YOUR OBLIGATION, OF COURSE, WOULD BE TO DECLINE TO INDICT, TO TURN THE CASE AWAY AND NOT HAVE IT GO FORWARD.

A GRAND JURY CONSISTS OF 23 MEMBERS OF THE COMMUNITY DRAWN AT RANDOM. I'VE USED THE TERM "INFAMOUS CRIME." AN INFAMOUS CRIME, UNDER OUR LAW, REFERS TO A SERIOUS CRIME WHICH CAN BE PUNISHED BY IMPRISONMENT BY MORE THAN ONE YEAR. THE PROSECUTORS WILL PRESENT FELONY CASES TO THE GRAND JURY. MISDEMEANORS, UNDER FEDERAL LAW, THEY HAVE DISCRETION TO CHARGE ON THEIR OWN. AND THEY'RE NOT -- THOSE CHARGES -- MISDEMEANORS AREN'T ENTITLED TO PRESENTMENT BEFORE A GRAND JURY.

BUT ANY CASE THAT CARRIES A PENALTY OF A YEAR OR MORE MUST BE PRESENTED TO -- ACTUALLY, MORE THAN A YEAR. A

YEAR AND A DAY OR LONGER MUST BE PRESENTED TO A GRAND JURY.

THE PURPOSE OF THE GRAND JURY, AS I MENTIONED, IS TO DETERMINE WHETHER THERE'S SUFFICIENT EVIDENCE TO JUSTIFY A FORMAL ACCUSATION AGAINST A PERSON.

IF LAW ENFORCEMENT OFFICIALS -- AND I DON'T MEAN THIS IN A DISPARAGING WAY. BUT IF LAW ENFORCEMENT OFFICIALS, INCLUDING AGENTS AS WELL AS THE FOLKS THAT STAFF THE U.S. ATTORNEY'S OFFICE, WERE NOT REQUIRED TO SUBMIT CHARGES TO AN IMPARTIAL GRAND JURY TO DETERMINE WHETHER THE EVIDENCE WAS SUFFICIENT, THEN OFFICIALS IN OUR COUNTRY WOULD BE FREE TO ARREST AND BRING ANYONE TO TRIAL NO MATTER HOW LITTLE EVIDENCE EXISTED TO SUPPORT THE CHARGE. WE DON'T WANT THAT. WE DON'T WANT THAT.

WE WANT THE BURDEN OF THE TRIAL TO BE JUSTIFIED BY SUBSTANTIAL EVIDENCE, EVIDENCE THAT CONVINCES YOU OF PROBABLE CAUSE TO BELIEVE THAT A CRIME PROBABLY OCCURRED AND THE PERSON IS PROBABLY RESPONSIBLE.

NOW, AGAIN, I MAKE THE DISTINCTION YOU DON'T HAVE TO VOTE ON ULTIMATE OUTCOMES. THAT'S NOT UP TO YOU. YOU CAN BE ASSURED THAT IN EACH CASE, YOU INDICT THE PERSON WHO WILL BE ENTITLED TO A FULL SET OF RIGHTS AND THAT THERE WILL BE A JURY TRIAL IF THE PERSON ELECTS ONE. THE JURY WILL HAVE TO PASS ON THE ACCUSATION ONCE AGAIN USING A MUCH HIGHER STANDARD OF PROOF, PROOF BEYOND A REASONABLE DOUBT.

AS MEMBERS OF THE GRAND JURY, YOU, IN A VERY REAL

SENSE, STAND BETWEEN THE GOVERNMENT AND THE ACCUSED. IT'S YOUR DUTY TO SEE THAT INDICTMENTS ARE RETURNED ONLY AGAINST THOSE WHOM YOU FIND PROBABLE CAUSE TO BELIEVE ARE GUILTY AND TO SEE TO IT THAT THE INNOCENT ARE NOT COMPELLED TO GO TO TRIAL OR EVEN COMPELLED TO FACE AN ACCUSATION.

IF A MEMBER OF THE GRAND JURY IS RELATED BY BLOOD OR MARRIAGE OR KNOWS OR SOCIALIZES TO SUCH AN EXTENT AS TO FIND HIMSELF OR HERSELF IN A BIASED STATE OF MIND AS TO THE PERSON UNDER INVESTIGATION OR ALTERNATIVELY YOU SHOULD FIND YOURSELF BIASED FOR ANY REASON, THEN THAT PERSON SHOULD NOT PARTICIPATE IN THE INVESTIGATION UNDER QUESTION OR RETURN THE INDICTMENT.

ONE OF OUR GRAND JURORS, MS. GARFIELD, HAS RELATIVES THAT -- OBVIOUSLY, MS. GARFIELD, IF YOUR SON OR YOUR HUSBAND WAS EVER CALLED IN FRONT OF THE GRAND JURY, THAT WOULD BE A CASE WHERE YOU WOULD SAY, "THIS IS JUST TOO CLOSE. I'M GOING TO RECUSE MYSELF FROM THIS PARTICULAR CASE. NO ONE WOULD IMAGINE THAT I COULD BE ABSOLUTELY IMPARTIAL WHEN IT COMES TO MY OWN BLOOD RELATIVES."

SO THOSE ARE THE KINDS OF SITUATIONS THAT I REFER TO WHEN I TALK ABOUT EXCUSING YOURSELF FROM A PARTICULAR GRAND JURY DELIBERATION. IF THAT HAPPENS, YOU SHOULD INDICATE TO THE FOREPERSON OF THE GRAND JURY, WITHOUT GOING INTO DETAIL, FOR WHATEVER REASON, THAT YOU WANT TO BE EXCUSED FROM GRAND JURY DELIBERATIONS ON A PARTICULAR CASE OR CONSIDERATION OF A

PARTICULAR MATTER IN WHICH YOU FEEL YOU'RE BIASED OR YOU MAY HAVE A CONFLICT.

THIS DOES NOT MEAN THAT IF YOU HAVE AN OPPORTUNITY, YOU SHOULD NOT PARTICIPATE IN AN INVESTIGATION. HOWEVER, IT DOES MEAN THAT IF YOU HAVE A FIXED STATE OF MIND BEFORE YOU HEAR EVIDENCE EITHER ON THE BASIS OF FRIENDSHIP OR BECAUSE YOU HATE SOMEBODY OR HAVE SIMILAR MOTIVATION, THEN YOU SHOULD STEP ASIDE AND NOT PARTICIPATE IN THAT PARTICULAR GRAND JURY INVESTIGATION AND IN VOTING ON THE PROPOSED INDICTMENT. THIS IS WHAT I MEANT WHEN I TALKED TO YOU ABOUT BEING FAIR-MINDED.

ALTHOUGH THE GRAND JURY HAS EXTENSIVE POWERS, THEY'RE LIMITED IN SOME IMPORTANT RESPECTS.

FIRST, THESE ARE THE LIMITATIONS ON YOUR SERVICE: YOU CAN ONLY INVESTIGATE CONDUCT THAT VIOLATES THE FEDERAL CRIMINAL LAWS. THAT'S YOUR CHARGE AS FEDERAL GRAND JURORS, TO LOOK AT VIOLATIONS OR SUSPECTED VIOLATIONS OF FEDERAL CRIMINAL LAW.

YOU ARE A FEDERAL GRAND JURY, AND CRIMINAL ACTIVITY WHICH VIOLATES STATE LAW, THE LAWS OF THE STATE OF CALIFORNIA, IS OUTSIDE OF YOUR INQUIRY. IT MAY HAPPEN AND FREQUENTLY DOES HAPPEN THAT SOME OF THE CONDUCT THAT'S UNDER INVESTIGATION BY THE FEDERAL GRAND JURY ALSO VIOLATES STATE LAW. AND THIS IS FINE. THAT'S PROPER. BUT THERE ALWAYS HAS TO BE SOME FEDERAL CONNECTION TO WHAT IS UNDER INVESTIGATION OR YOU HAVE NO JURISDICTION.

THERE'S ALSO A GEOGRAPHIC LIMITATION ON THE SCOPE OF YOUR INQUIRIES AND THE EXERCISE OF YOUR POWERS. YOU MAY INQUIRE ONLY INTO FEDERAL OFFENSES COMMITTED IN OUR FEDERAL DISTRICT, WHICH INCLUDES SAN DIEGO AND IMPERIAL COUNTIES; THAT IS, THE SOUTHERN DISTRICT OF CALIFORNIA.

YOU MAY HAVE CASES THAT IMPLICATE ACTIVITIES IN OTHER AREAS, OTHER DISTRICTS, AND THERE MAY BE SOME EVIDENCE OF CRIMINAL ACTIVITY IN CONJUNCTION WITH WHAT GOES ON HERE THAT'S ALSO HAPPENING ELSEWHERE. THERE ALWAYS HAS TO BE A CONNECTION TO OUR DISTRICT.

THROUGHOUT THE UNITED STATES, WE HAVE 93 DISTRICTS NOW. THE STATES ARE CUT UP LIKE PIECES OF PIE, AND EACH DISTRICT IS SEPARATELY DENOMINATED, AND EACH DISTRICT HAS RESPONSIBILITY FOR THEIR OWN COUNTIES AND GEOGRAPHY. AND YOU, TOO, ARE BOUND BY THAT LIMITATION.

I'VE GONE OVER THIS WITH A COUPLE OF PEOPLE. YOU UNDERSTOOD FROM THE QUESTIONS AND ANSWERS THAT A COUPLE OF PEOPLE WERE EXCUSED, I THINK THREE IN THIS CASE, BECAUSE THEY COULD NOT ADHERE TO THE PRINCIPLE THAT I'M ABOUT TO TELL YOU.

BUT IT'S NOT FOR YOU TO JUDGE THE WISDOM OF THE CRIMINAL LAWS ENACTED BY CONGRESS; THAT IS, WHETHER OR NOT THERE SHOULD BE A FEDERAL LAW OR SHOULD NOT BE A FEDERAL LAW DESIGNATING CERTAIN ACTIVITY IS CRIMINAL IS NOT UP TO YOU. THAT'S A JUDGMENT THAT CONGRESS MAKES.

AND IF YOU DISAGREE WITH THAT JUDGMENT MADE BY

CONGRESS, THEN YOUR OPTION IS NOT TO SAY "WELL, I'M GOING TO VOTE AGAINST INDICTING EVEN THOUGH I THINK THAT THE EVIDENCE IS SUFFICIENT" OR "I'M GOING TO VOTE IN FAVOR OF EVEN THOUGH THE EVIDENCE MAY BE INSUFFICIENT." INSTEAD, YOUR OBLIGATION IS TO CONTACT YOUR CONGRESSMAN OR ADVOCATE FOR A CHANGE IN THE LAWS, BUT NOT TO BRING YOUR PERSONAL DEFINITION OF WHAT THE LAW OUGHT TO BE AND TRY TO IMPOSE THAT THROUGH APPLYING IT IN A GRAND JURY SETTING.

FURTHERMORE, WHEN YOU'RE DECIDING WHETHER TO INDICT OR NOT TO INDICT, YOU SHOULDN'T BE CONCERNED WITH PUNISHMENT THAT ATTACHES TO THE CHARGE. I THINK I ALSO ALLUDED TO THIS IN THE CONVERSATION WITH ONE GENTLEMAN. JUDGES ALONE DETERMINE PUNISHMENT. WE TELL TRIAL JURIES IN CRIMINAL CASES THAT THEY'RE NOT TO BE CONCERNED WITH THE MATTER OF PUNISHMENT EITHER. YOUR OBLIGATION AT THE END OF THE DAY IS TO MAKE A BUSINESS-LIKE DECISION ON FACTS AND APPLY THOSE FACTS TO THE LAW AS IT'S EXPLAINED AND READ TO YOU.

THE CASES WHICH YOU'LL APPEAR WILL COME BEFORE YOU IN VARIOUS WAYS. FREQUENTLY, PEOPLE ARE ARRESTED DURING OR SHORTLY AFTER THE COMMISSION OF AN ALLEGED CRIME. AND THEN THEY'RE TAKEN BEFORE A MAGISTRATE JUDGE, WHO HOLDS A PRELIMINARY HEARING TO DETERMINE WHETHER INITIALLY THERE'S PROBABLE CAUSE TO BELIEVE A PERSON'S COMMITTED A CRIME.

ONCE THE MAGISTRATE JUDGE FINDS PROBABLE CAUSE, HE OR SHE WILL DIRECT THAT THE ACCUSED PERSON BE HELD FOR ACTION

BY THE GRAND JURY. REMEMBER, UNDER OUR SYSTEM AND THE 5TH AMENDMENT, TRIALS OF SERIOUS AND INFAMOUS CRIMES CAN ONLY PROCEED WITH GRAND JURY ACTION. SO THE DETERMINATION OF THE MAGISTRATE JUDGE IS JUST TO HOLD THE PERSON UNTIL THE GRAND JURY CAN ACT. IT TAKES YOUR ACTION AS A GRAND JURY BEFORE THE CASE CAN FORMALLY GO FORWARD. IT'S AT THAT POINT THAT YOU'LL BE CALLED UPON TO CONSIDER WHETHER AN INDICTMENT SHOULD BE RETURNED IN A GIVEN CASE.

OTHER CASES MAY BE BROUGHT TO YOU BY THE UNITED STATES ATTORNEY OR AN ASSISTANT UNITED STATES ATTORNEY BEFORE AN ARREST IS MADE. BUT DURING THE COURSE OF AN INVESTIGATION OR AFTER AN INVESTIGATION HAS BEEN CONDUCTED, THERE'S TWO WAYS THAT CASES GENERALLY ENTER THE CRIMINAL JUSTICE PROCESS: THE REACTIVE OFFENSES WHERE, AS THE NAME IMPLIES, THE POLICE REACT TO A CRIME AND ARREST SOMEBODY. AND THOSE CASES WILL THEN BE SUBMITTED TO YOU AFTER MUCH OF THE FACTS ARE KNOWN. AND THEN THERE'S PROACTIVE CASES, CASES WHERE MAYBE THERE'S A SUSPICION OR A HUNCH OF WRONGDOING. THE FBI MAY BE CALLED UPON TO INVESTIGATE OR SOME OTHER FEDERAL AGENCY, AND THEY MAY NEED THE ASSISTANCE OF THE GRAND JURY IN FACILITATING THAT INVESTIGATION.

THE GRAND JURY HAS BROAD INVESTIGATORY POWERS. YOU HAVE THE POWER TO ISSUE SUBPOENAS, FOR EXAMPLE, FOR RECORDS OR FOR PEOPLE TO APPEAR. SOMETIMES IT HAPPENS THAT PEOPLE SAY "I DON'T HAVE TO TALK TO YOU" TO THE FBI, AND THEY REFUSE TO TALK

TO THE AUTHORITIES. UNDER THOSE CIRCUMSTANCES, ON OCCASION, THE FBI MAY GO TO THE U.S. ATTORNEY AND SAY, "LOOK, YOU NEED TO FIND OUT WHAT HAPPENED HERE. SUMMON THIS PERSON IN FRONT OF THE GRAND JURY." SO IT MAY BE THAT YOU'RE CALLED UPON TO EVALUATE WHETHER A CRIME OCCURRED AND WHETHER THERE OUGHT TO BE AN INDICTMENT. YOU, IN A VERY REAL SENSE, ARE PART OF THE INVESTIGATION.

IT MAY HAPPEN THAT DURING THE COURSE OF AN INVESTIGATION INTO ONE CRIME, IT TURNS OUT THAT THERE IS EVIDENCE OF A DIFFERENT CRIME THAT SURFACES. YOU, AS GRAND JURORS, HAVE A RIGHT TO PURSUE THE NEW CRIME THAT YOU INVESTIGATE, EVEN CALLING NEW WITNESSES AND SEEKING OTHER DOCUMENTS OR PAPERS OR EVIDENCE BE SUBPOENAED.

NOW, IN THAT REGARD, THERE'S A CLOSE ASSOCIATION BETWEEN THE GRAND JURY AND THE U.S. ATTORNEY'S OFFICE AND THE INVESTIGATIVE AGENCIES OF THE FEDERAL GOVERNMENT. UNLIKE THE U.S. ATTORNEY'S OFFICE OR THOSE INVESTIGATIVE AGENCIES, THE GRAND JURY DOESN'T HAVE ANY POWER TO EMPLOY INVESTIGATORS OR TO EXPEND FEDERAL FUNDS FOR INVESTIGATIVE PURPOSES.

INSTEAD, YOU MUST GO BACK TO THE U.S. ATTORNEY AND ASK THAT THOSE THINGS BE DONE. YOU'LL WORK CLOSELY WITH THE U.S. ATTORNEY'S OFFICE IN YOUR INVESTIGATION OF CASES. IF ONE OR MORE GRAND JURORS WANT TO HEAR ADDITIONAL EVIDENCE ON A CASE OR THINK THAT SOME ASPECT OF THE CASE OUGHT TO BE PURSUED, YOU MAY MAKE THAT REQUEST TO THE U.S. ATTORNEY.

IF THE U.S. ATTORNEY REFUSES TO ASSIST YOU OR IF YOU BELIEVE THAT THE U.S. ATTORNEY IS NOT ACTING IMPARTIALLY, THEN YOU CAN TAKE THE MATTER UP WITH ME. I'M THE ASSIGNED JURY JUDGE, AND I WILL BE THE LIAISON WITH THE GRAND JURIES.

YOU CAN USE YOUR POWER TO INVESTIGATE EVEN OVER THE ACTIVE OPPOSITION OF THE UNITED STATES ATTORNEY. IF THE MAJORITY OF YOU ON THE GRAND JURY THINK THAT A SUBJECT OUGHT TO BE PURSUED AND THE U.S. ATTORNEY THINKS NOT, THEN YOUR DECISION TRUMPS, AND YOU HAVE THE RIGHT TO HAVE THAT INVESTIGATION PURSUED IF YOU BELIEVE IT'S NECESSARY TO DO SO IN THE INTEREST OF JUSTICE.

I MENTION THESE THINGS TO YOU AS A THEORETICAL POSSIBILITY. THE TRUTH OF THE MATTER IS IN MY EXPERIENCE HERE IN THE OVER 20 YEARS IN THIS COURT, THAT KIND OF TENSION DOES NOT EXIST ON A REGULAR BASIS, THAT I CAN RECALL, BETWEEN THE U.S. ATTORNEY AND GRAND JURIES. THEY GENERALLY WORK TOGETHER. THE U.S. ATTORNEY IS GENERALLY DEFERENTIAL TO THE GRAND JURY AND WHAT THE GRAND JURY WANTS.

IT'S IMPORTANT TO KEEP IN MIND THAT YOU WILL AND DO HAVE AN INVESTIGATORY FUNCTION AND THAT THAT FUNCTION IS PARAMOUNT TO EVEN WHAT THE U.S. ATTORNEY MAY WANT YOU TO DO.

IF YOU, AS I SAID, BELIEVE THAT AN INVESTIGATION OUGHT TO GO INTO OTHER AREAS BOTH IN TERMS OF SUBJECT MATTER, BEING A FEDERAL CRIME, AND GEOGRAPHICALLY, THEN YOU AS A GROUP CAN MAKE THAT DETERMINATION AND DIRECT THE INVESTIGATION THAT

WAY.

SINCE THE UNITED STATES ATTORNEY HAS THE DUTY OF PROSECUTING PERSONS CHARGED WITH THE COMMISSION OF FEDERAL CRIMES, SHE OR ONE OF HER ASSISTANTS -- BY THE WAY, THE U.S. ATTORNEY IN OUR DISTRICT IS MS. CAROL LAM -- SHE OR ONE OF HER ASSISTANTS WILL PRESENT THE MATTERS WHICH THE GOVERNMENT HAS DESIRES TO HAVE YOU CONSIDER. THE ATTORNEY WILL EDUCATE YOU ON THE LAW THAT APPLIES BY READING THE LAW TO YOU OR POINTING IT OUT, THE LAW THAT THE GOVERNMENT BELIEVES WAS VIOLATED. THE ATTORNEY WILL SUBPOENA FOR TESTIMONY BEFORE YOU SUCH WITNESSES AS THE LAWYER THINKS ARE IMPORTANT AND NECESSARY TO ESTABLISH PROBABLE CAUSE AND ALLOW YOU TO DO YOUR FUNCTION, AND ALSO ANY OTHER WITNESSES THAT YOU MAY REQUEST THE ATTORNEY TO CALL IN RELATION TO THE SUBJECT MATTER UNDER INVESTIGATION.

REMEMBER THAT THE DIFFERENCE BETWEEN THE GRAND JURY FUNCTION AND THAT OF THE TRIAL JURY IS THAT YOU ARE NOT PRESIDING IN A FULL-BLOWN TRIAL. IN MOST OF THE CASES THAT YOU APPEAR, THE LAWYER FOR THE GOVERNMENT IS NOT GOING TO BRING IN EVERYBODY THAT MIGHT BE BROUGHT IN AT THE TIME OF TRIAL; THAT IS, EVERYBODY THAT HAS SOME RELEVANT EVIDENCE TO OFFER. THEY'RE NOT GOING TO BRING IN EVERYONE WHO CONCEIVABLY COULD SAY SOMETHING THAT MIGHT BEAR ON THE OUTCOME. THEY'RE PROBABLY GOING TO BRING IN A LIMITED NUMBER OF WITNESSES JUST TO ESTABLISH PROBABLE CAUSE. OFTENTIMES, THEY PRESENT A SKELETON CASE. IT'S EFFICIENT. IT'S ALL THAT'S NECESSARY.

IT SAVES TIME AND RESOURCES.

WHEN YOU ARE PRESENTED WITH A CASE, IT WILL TAKE 16 OF YOUR NUMBER OUT OF THE 23, 16 MEMBERS OF THE GRAND JURY OUT OF THE 23, TO CONSTITUTE A QUORUM. YOU CAN'T DO BUSINESS UNLESS THERE'S AT LEAST 16 MEMBERS OF THE GRAND JURY PRESENT FOR THE TRANSACTION OF ANY BUSINESS. IF FEWER THAN 16 GRAND JURORS ARE PRESENT EVEN FOR A MOMENT, THEN THE PROCEEDINGS OF THE GRAND JURY MUST STOP. YOU CAN NEVER OPERATE WITHOUT A QUORUM OF AT LEAST 16 MEMBERS PRESENT.

NOW, THE EVIDENCE THAT YOU WILL HEAR NORMALLY WILL CONSIST OF TESTIMONY OF WITNESSES AND WRITTEN DOCUMENTS. YOU MAY GET PHOTOGRAPHS. THE WITNESSES WILL APPEAR IN FRONT OF YOU SEPARATELY. WHEN A WITNESS FIRST APPEARS BEFORE YOU, THE GRAND JURY FOREPERSON WILL ADMINISTER AN OATH. THE PERSON MUST SWEAR OR AFFIRM TO TELL THE TRUTH. AND AFTER THAT'S BEEN ACCOMPLISHED, THE WITNESS WILL BE QUESTIONED.

ORDINARILY, THE U.S. ATTORNEY PRESIDING AT THE -- REPRESENTING THE U.S. GOVERNMENT AT THE GRAND JURY SESSION WILL ASK THE QUESTIONS FIRST. THEN THE FOREPERSON OF THE GRAND JURY MAY ASK QUESTIONS, AND OTHER MEMBERS OF THE GRAND JURY MAY ASK QUESTIONS, ALSO.

I USED TO APPEAR IN FRONT OF THE GRAND JURY. I'LL TELL YOU WHAT I WOULD DO IS FREQUENTLY I'D ASK THE QUESTIONS, AND THEN I'D SEND THE WITNESS OUT AND ASK THE GRAND JURORS IF THERE WERE ANY QUESTIONS THEY WANTED ME TO ASK. AND THE

REASON I DID THAT IS THAT I HAD THE LEGAL TRAINING TO KNOW WHAT WAS RELEVANT AND WHAT MIGHT BE PREJUDICIAL TO THE DETERMINATION OF WHETHER THERE WAS PROBABLE CAUSE.

A LOT OF TIMES PEOPLE WILL SAY, "WELL, HAS THIS PERSON EVER DONE IT BEFORE?" AND WHILE THAT MAY BE A RELEVANT QUESTION, ON THE ISSUE OF PROBABLE CAUSE, IT HAS TO BE ASSESSED ON A CASE-BY-CASE BASIS. IN OTHER WORDS, THE EVIDENCE OF THIS OCCASION OF CRIME THAT'S ALLEGED MUST BE ADEQUATE WITHOUT REGARD TO WHAT THE PERSON HAS DONE IN THE PAST. I WOULDN'T WANT THAT QUESTION ANSWERED UNTIL AFTER THE GRAND JURY HAD MADE A DETERMINATION OF WHETHER THERE WAS ENOUGH EVIDENCE.

SO WHEN I APPEARED IN FRONT OF THE GRAND JURY, I'D TELL THEM "YOU'LL GET YOUR QUESTION ANSWERED, BUT I'D LIKE YOU TO VOTE ON THE INDICTMENT FIRST. I'D LIKE YOU TO DETERMINE WHETHER THERE'S ENOUGH EVIDENCE BASED ON WHAT'S BEEN PRESENTED, AND THEN WE'LL ANSWER IT." I DIDN'T WANT TO PREJUDICE THE GRAND JURY. THERE MAY BE SIMILAR CONCERNS THAT COME UP. NOW, THE PRACTICES VARY AMONG THE ASSISTANT U.S. ATTORNEYS THAT WILL APPEAR IN FRONT OF YOU.

ON OTHER OCCASIONS WHEN I DIDN'T THINK THERE WAS ANY RISK THAT MIGHT PREJUDICE THE PROCESS, I WOULD ALLOW THE GRAND JURY TO FOLLOW UP THEMSELVES AND ASK QUESTIONS. A LOT OF TIMES, THE FOLLOW-UPS ARE FACTUAL ON DETAILED MATTERS. THAT PRACTICE WILL VARY DEPENDING ON WHO IS REPRESENTING THE UNITED

STATES AND PRESENTING THE CASE TO YOU. THE POINT IS YOU HAVE THE RIGHT TO ASK ADDITIONAL QUESTIONS OR TO ASK THAT THOSE QUESTIONS BE PUT TO THE WITNESS.

IN THE EVENT A WITNESS DOESN'T SPEAK OR UNDERSTAND ENGLISH, THEN ANOTHER PERSON WILL BE BROUGHT INTO THE ROOM. OBVIOUSLY, THAT WOULD BE AN INTERPRETER TO ALLOW YOU TO UNDERSTAND THE ANSWERS. WHEN WITNESSES DO APPEAR IN FRONT OF THE GRAND JURY, THEY SHOULD BE TREATED COURTEOUSLY. QUESTIONS SHOULD BE PUT TO THEM IN AN ORDERLY FASHION. THE QUESTIONS SHOULD NOT BE HOSTILE.

IF YOU HAVE ANY DOUBT WHETHER IT'S PROPER TO ASK A PARTICULAR QUESTION, THEN YOU CAN ASK THE U.S. ATTORNEY WHO'S ASSISTING IN THE INVESTIGATION FOR ADVICE ON THE MATTER. YOU ALONE AS GRAND JURORS DECIDE HOW MANY WITNESSES YOU WANT TO HEAR. WITNESSES CAN BE SUBPOENAED FROM ANYWHERE IN THE COUNTRY. YOU HAVE NATIONAL JURISDICTION.

HOWEVER, PERSONS SHOULD NOT ORDINARILY BE SUBJECTED TO DISRUPTION OF THEIR DAILY LIVES UNLESS THERE'S GOOD REASON. THEY SHOULDN'T BE HARASSED OR ANNOYED OR INCONVENIENCED. THAT'S NOT THE PURPOSE OF THE GRAND JURY HEARING, NOR SHOULD PUBLIC FUNDS BE EXPENDED TO BRING WITNESSES UNLESS YOU BELIEVE THAT THE WITNESSES CAN PROVIDE MEANINGFUL, RELEVANT EVIDENCE WHICH WILL ASSIST IN YOUR DETERMINATIONS AND YOUR INVESTIGATION.

ALL WITNESSES WHO ARE CALLED IN FRONT OF THE GRAND

JURY HAVE CERTAIN RIGHTS. THESE INCLUDE, AMONG OTHERS, THE RIGHT TO REFUSE TO ANSWER QUESTIONS ON THE GROUNDS THAT THE ANSWER TO A QUESTION MIGHT INCRIMINATE THEM AND THE RIGHT TO KNOW THAT ANYTHING THEY SAY MIGHT BE USED AGAINST THEM.

THE U.S. ATTORNEYS ARE CHARGED WITH THE OBLIGATION, WHEN THEY'RE AWARE OF IT, OF ADVISING PEOPLE OF THIS RIGHT BEFORE THEY QUESTION THEM. BUT BEAR THAT IN MIND.

IF A WITNESS DOES EXERCISE THE RIGHT AGAINST SELF-INCRIMINATION, THEN THE GRAND JURY SHOULD NOT HOLD THAT AS ANY PREJUDICE OR BIAS AGAINST THAT WITNESS. IT CAN PLAY NO PART IN THE RETURN OF AN INDICTMENT AGAINST THE WITNESS. IN OTHER WORDS, THE MERE EXERCISE OF THE PRIVILEGE AGAINST SELF-INCRIMINATION, WHICH ALL OF US HAVE AS UNITED STATES RESIDENTS, SHOULD NOT FACTOR INTO YOUR DETERMINATION OF WHETHER THERE'S PROBABLE CAUSE TO GO FORWARD IN THIS CASE. YOU MUST RESPECT THAT DETERMINATION BY THE PERSON AND NOT USE IT AGAINST THEM.

IT'S AN UNCOMMON SITUATION THAT YOU'LL FACE WHEN SOMEBODY DOES CLAIM THE PRIVILEGE AGAINST SELF-INCRIMINATION. THAT'S BECAUSE USUALLY AT THE TIME A PERSON IS SUBPOENAED, IF THERE'S A PROSPECT THAT THEY'RE GOING TO CLAIM THE PRIVILEGE, THE U.S. ATTORNEY IS PUT ON NOTICE OF THAT BEFOREHAND EITHER BY THE PERSON HIMSELF OR HERSELF OR MAYBE A LAWYER REPRESENTING THE PERSON.

IN MY EXPERIENCE, MOST OF THE TIME THE U.S. ATTORNEY

WILL NOT THEN CALL THE PERSON IN FRONT OF YOU BECAUSE IT WOULD BE TO NO EFFECT TO CALL THEM AND HAVE THEM ASSERT THEIR 5TH AMENDMENT PRIVILEGE. BUT IT SOMETIMES DOES COME UP. IT SOMETIMES HAPPENS. SOMETIMES THERE'S A QUESTION OF WHETHER THE PERSON HAS A BONA FIDE PRIVILEGE AGAINST SELF-INCRIMINATION. THAT'S A MATTER FOR THE COURT TO DETERMINE IN ANCILLARY PROCEEDINGS. OR THE U.S. ATTORNEY MAY BE UNAWARE OF A PERSON'S INCLINATION TO ASSERT THE 5TH. SO IT MAY COME UP IN FRONT OF YOU. IT DOESN'T ALWAYS COME UP.

AS I MENTIONED TO YOU IN MY PRELIMINARY REMARKS, WITNESSES ARE NOT PERMITTED TO HAVE A LAWYER WITH THEM IN THE GRAND JURY ROOM. THE LAW DOESN'T PERMIT A WITNESS SUMMONED BEFORE THE GRAND JURY TO BRING THE LAWYER WITH THEM, ALTHOUGH WITNESSES DO HAVE A RIGHT TO CONFER WITH THEIR LAWYERS DURING THE COURSE OF GRAND JURY INVESTIGATION PROVIDED THE CONFERENCE OCCURS OUTSIDE THE GRAND JURY ROOM.

YOU MAY FACE A SITUATION WHERE A WITNESS SAYS "I'D LIKE TO TALK TO MY LAWYER BEFORE I ANSWER THAT QUESTION," IN WHICH CASE THE PERSON WOULD LEAVE THE ROOM, CONSULT WITH THE LAWYER, AND THEN COME BACK INTO THE ROOM WHERE FURTHER ACTION WOULD TAKE PLACE.

APPEARANCES BEFORE A GRAND JURY SOMETIMES PRESENT COMPLEX LEGAL PROBLEMS THAT REQUIRE THE ASSISTANCE OF LAWYERS. YOU'RE NOT TO DRAW ANY ADVERSE INFERENCE IF A WITNESS DOES ASK TO LEAVE THE ROOM TO SPEAK TO HIS LAWYER OR HER LAWYER AND

THEN LEAVES FOR THAT PURPOSE.

ORDINARILY, NEITHER THE ACCUSED OR ANY WITNESS ON THE ACCUSED'S BEHALF WILL TESTIFY IN THE GRAND JURY SESSION. BUT UPON THE REQUEST OF AN ACCUSED, PREFERABLY IN WRITING, YOU MAY AFFORD THE ACCUSED AN OPPORTUNITY TO APPEAR IN FRONT OF YOU.

AS I'VE SAID, THESE PROCEEDINGS TEND TO BE ONE-SIDED NECESSARILY. THE PROSECUTOR IS ASKING YOU TO RETURN AN INDICTMENT TO A CRIMINAL CHARGE, AND THEY'LL MUSTER THE EVIDENCE THAT THEY HAVE THAT THEY BELIEVE SUPPORTS PROBABLE CAUSE AND PRESENT THAT TO YOU. BECAUSE IT'S NOT A FULL-BLOWN TRIAL, YOU'RE LIKELY IN MOST CASES NOT TO HEAR THE OTHER SIDE OF THE STORY, IF THERE IS ANOTHER SIDE TO THE STORY. THERE'S NO PROVISION OF LAW THAT ALLOWS AN ACCUSED, FOR EXAMPLE, TO CONTEST THE MATTER IN FRONT OF THE GRAND JURY.

IT MAY HAPPEN, AS I SAID, THAT AN ACCUSED MAY ASK TO APPEAR IN FRONT OF YOU. BECAUSE THE APPEARANCE OF SOMEONE ACCUSED OF A CRIME MAY RAISE COMPLICATED LEGAL PROBLEMS, YOU SHOULD SEEK THE U.S. ATTORNEY'S ADVICE AND COUNSEL, IF NECESSARY, AND THAT OF THE COURT BEFORE ALLOWING THAT.

BEFORE ANY ACCUSED PERSON IS ALLOWED TO TESTIFY, THEY MUST BE ADVISED OF THEIR RIGHTS, AND YOU SHOULD BE COMPLETELY SATISFIED THAT THEY UNDERSTAND WHAT THEY'RE DOING.

YOU'RE NOT REQUIRED TO SUMMON WITNESSES WHICH AN ACCUSED PERSON MAY WANT YOU TO HAVE EXAMINED UNLESS PROBABLE

CAUSE FOR AN INDICTMENT MAY BE EXPLAINED AWAY BY THE TESTIMONY OF THOSE WITNESSES.

NOW, AGAIN, THIS EMPHASIZES THE DIFFERENCE BETWEEN THE FUNCTION OF THE GRAND JURY AND THE TRIAL JURY. YOU'RE ALL ABOUT PROBABLE CAUSE. IF YOU THINK THAT THERE'S EVIDENCE OUT THERE THAT MIGHT CAUSE YOU TO SAY "WELL, I DON'T THINK PROBABLE CAUSE EXISTS," THEN IT'S INCUMBENT UPON YOU TO HEAR THAT EVIDENCE AS WELL. AS I TOLD YOU, IN MOST INSTANCES, THE U.S. ATTORNEYS ARE DUTY-BOUND TO PRESENT EVIDENCE THAT CUTS AGAINST WHAT THEY MAY BE ASKING YOU TO DO IF THEY'RE AWARE OF THAT EVIDENCE.

THE DETERMINATION OF WHETHER A WITNESS IS TELLING THE TRUTH IS SOMETHING FOR YOU TO DECIDE. NEITHER THE COURT NOR THE PROSECUTORS NOR ANY OFFICERS OF THE COURT MAY MAKE THAT DETERMINATION FOR YOU. IT'S THE EXCLUSIVE PROVINCE OF GRAND JURORS TO DETERMINE WHO IS CREDIBLE AND WHO MAY NOT BE.

FINALLY, LET ME TELL YOU THIS: THERE'S ANOTHER DIFFERENCE BETWEEN OUR GRAND JURY PROCEDURE HERE AND PROCEDURES YOU MAY BE FAMILIAR WITH HAVING SERVED ON STATE TRIAL JURIES OR FEDERAL TRIAL JURIES OR EVEN ON THE STATE GRAND JURY; HEARSAY TESTIMONY, THAT IS, TESTIMONY AS TO FACTS NOT PERSONALLY KNOWN BY THE WITNESS, BUT WHICH THE WITNESS HAS BEEN TOLD OR RELATED BY OTHER PERSONS MAY BE DEEMED BY YOU PERSUASIVE AND MAY PROVIDE A BASIS FOR RETURNING AN INDICTMENT AGAINST AN ACCUSED.

WHAT I MEAN BY THAT IS IF IT'S A FULL-BLOWN TRIAL WHERE THE RULES OF EVIDENCE APPLY -- AND ALL OF US ARE FAMILIAR WITH THIS TERM "HEARSAY EVIDENCE." GENERALLY, IT FORBIDS SOMEBODY FROM REPEATING WHAT SOMEONE ELSE TOLD THEM OUTSIDE OF COURT. OH, THERE'S A MILLION EXCEPTIONS TO THE HEARSAY RULE, BUT THAT'S THE GIST OF THE RULE.

USUALLY, WE INSIST ON THE SPEAKER OF THE WORDS TO COME IN SO THAT WE CAN KNOW THE CONTEXT OF IT. THAT RULE DOESN'T APPLY IN THE GRAND JURY CONTEXT. BECAUSE IT'S A PRELIMINARY PROCEEDING, BECAUSE ULTIMATELY GUILT OR INNOCENCE IS NOT BEING DETERMINED, THE EVIDENTIARY STANDARDS ARE RELAXED. THE PROSECUTORS ARE ENTITLED TO PUT ON HEARSAY EVIDENCE.

HOW DOES THAT PLAY OUT IN REAL LIFE? WELL, YOU'RE GOING TO BE HEARING A LOT OF BORDER TYPE CASES. IT DOESN'T MAKE SENSE, IT'S NOT EFFICIENT, IT'S NOT COST-EFFECTIVE TO PULL ALL OF OUR BORDER GUARDS OFF THE BORDER TO COME UP AND TESTIFY. WHO IS LEFT GUARDING THE BORDER, THEN?

WHAT THEY'VE DONE IN THE BORDER CASES IN PARTICULAR IF THEY USUALLY HAVE A SUMMARY WITNESS; A WITNESS FROM, FOR EXAMPLE, BORDER PATROL OR CUSTOMS WHO WILL TALK TO THE PEOPLE OR READ THE REPORTS OF THE PEOPLE WHO ACTUALLY MADE THE ARREST. THAT PERSON WILL COME IN AND TESTIFY ABOUT WHAT HAPPENED. THE PERSON WON'T HAVE FIRST-HAND KNOWLEDGE, BUT THEY'LL BE RELIABLY INFORMED BY THE PERSON WITH FIRST-HAND

KNOWLEDGE OF WHAT OCCURRED, AND THEY'LL BE THE WITNESS BEFORE THE GRAND JURY.

YOU SHOULD EXPECT AND COUNT ON THE FACT THAT YOU'RE GOING TO HEAR EVIDENCE IN THE FORM OF HEARSAY THAT WOULD NOT BE ADMISSIBLE IF THE CASE GOES FORWARD TO TRIAL, BUT IS ADMISSIBLE AT THE GRAND JURY STAGE.

AFTER YOU'VE HEARD ALL OF THE EVIDENCE THAT THE U.S. ATTORNEY INTENDS TO PRESENT OR THAT YOU WANT TO HEAR IN A PARTICULAR MATTER, YOU'RE THEN CHARGED WITH THE OBLIGATION OF DELIBERATING TO DETERMINE WHETHER THE ACCUSED PERSON OUGHT TO BE INDICTED. NO ONE OTHER THAN YOUR OWN MEMBERS, THE MEMBERS OF THE GRAND JURY, IS TO BE PRESENT IN THE GRAND JURY ROOM WHILE YOU'RE DELIBERATING.

WHAT THAT MEANS IS THE COURT REPORTER, THE ASSISTANT U.S. ATTORNEY, ANYONE ELSE, THE INTERPRETER WHO MAY HAVE BEEN PRESENT TO INTERPRET FOR A WITNESS, MUST GO OUT OF THE ROOM, AND THE PROCEEDING MUST GO FORWARD WITH ONLY GRAND JURORS PRESENT DURING THE DELIBERATION AND VOTING ON AN INDICTMENT.

YOU HEARD ME EXPLAIN EARLIER THAT AT VARIOUS TIMES DURING THE PRESENTATION OF MATTERS BEFORE YOU, OTHER PEOPLE MAY BE PRESENT IN THE GRAND JURY. THIS IS PERFECTLY ACCEPTABLE. THE RULE THAT I HAVE JUST READ TO YOU ABOUT YOUR PRESENCE ALONE IN THE GRAND JURY ROOM APPLIES ONLY DURING DELIBERATION AND VOTING ON INDICTMENTS.

TO RETURN AN INDICTMENT CHARGING SOMEONE WITH AN

OFFENSE, IT'S NOT NECESSARY, AS I MENTIONED MANY TIMES, THAT YOU FIND PROOF BEYOND A REASONABLE DOUBT. THAT'S THE TRIAL STANDARD, NOT THE GRAND JURY STANDARD. YOUR TASK IS TO DETERMINE WHETHER THE GOVERNMENT'S EVIDENCE, AS PRESENTED TO YOU, IS SUFFICIENT TO CONCLUDE THAT THERE'S PROBABLE CAUSE TO BELIEVE THAT THE ACCUSED IS GUILTY OF THE PROPOSED OR CHARGED OFFENSE.

I EXPLAINED TO YOU WHAT THAT STANDARD MEANS. LET ME, AT THE RISK OF BORING YOU, TELL YOU ONE MORE TIME.

PROBABLE CAUSE MEANS THAT YOU HAVE AN HONESTLY HELD CONSCIENTIOUS BELIEF AND THAT THE BELIEF IS REASONABLE THAT A FEDERAL CRIME WAS COMMITTED AND THAT THE PERSON TO BE INDICTED WAS SOMEHOW ASSOCIATED WITH THE COMMISSION OF THAT CRIME. EITHER THEY COMMITTED IT THEMSELVES OR THEY HELPED SOMEONE COMMIT IT OR THEY WERE PART OF A CONSPIRACY, AN ILLEGAL AGREEMENT, TO COMMIT THAT CRIME.

TO PUT IT ANOTHER WAY, YOU SHOULD VOTE TO INDICT WHEN THE EVIDENCE PRESENTED TO YOU IS SUFFICIENTLY STRONG TO WARRANT A REASONABLE PERSON TO BELIEVE THAT THE ACCUSED IS PROBABLY GUILTY OF THE OFFENSE WHICH IS PROPOSED.

EACH GRAND JUROR HAS THE RIGHT TO EXPRESS VIEWS ON THE MATTER UNDER CONSIDERATION. AND ONLY AFTER ALL GRAND JURORS HAVE BEEN GIVEN A FULL OPPORTUNITY TO BE HEARD SHOULD YOU VOTE ON THE MATTER BEFORE YOU. YOU MAY DECIDE AFTER DELIBERATION AMONG YOURSELVES THAT YOU NEED MORE EVIDENCE, THAT MORE EVIDENCE SHOULD BE CONSIDERED BEFORE A VOTE IS TAKEN. IN SUCH CASES, THE U.S ATTORNEY OR THE ASSISTANT U.S. ATTORNEY CAN BE DIRECTED TO SUBPOENA ADDITIONAL DOCUMENTS OR WITNESSES FOR YOU TO CONSIDER IN ORDER TO MAKE YOUR DETERMINATION.

WHEN YOU'VE DECIDED TO VOTE, THE FOREPERSON SHOULD KEEP A RECORD OF THE VOTE. THAT RECORD SHOULD BE FILED WITH THE CLERK OF THE COURT. THE RECORD DOESN'T INCLUDE THE NAMES OF THE JURORS OR HOW THEY VOTED, BUT ONLY THE NUMBER OF VOTES FOR THE INDICTMENT. SO IT'S AN ANONYMOUS VOTE. YOU'LL KNOW AMONG YOURSELVES WHO VOTED WHICH WAY, BUT THAT INFORMATION DOES NOT GET CAPTURED OR RECORDED, JUST THE NUMBER OF PEOPLE VOTING FOR INDICTMENT.

IF 12 OR MORE MEMBERS OF THE GRAND JURY AFTER DELIBERATION BELIEVE THAT AN INDICTMENT IS WARRANTED, THEN YOU'LL REQUEST THE UNITED STATES ATTORNEY TO PREPARE A FORMAL WRITTEN INDICTMENT IF ONE'S NOT ALREADY BEEN PREPARED AND PRESENTED TO YOU. IN MY EXPERIENCE, MOST OF THE TIME THE U.S. ATTORNEY WILL SHOW UP WITH THE WITNESSES AND WILL HAVE THE PROPOSED INDICTMENT WITH THEM. SO YOU'LL HAVE THAT TO CONSIDER. YOU'LL KNOW EXACTLY WHAT THE PROPOSED CHARGES ARE.

THE INDICTMENT WILL SET FORTH THE DATE AND THE PLACE OF THE ALLEGED OFFENSE AND THE CIRCUMSTANCES THAT THE U.S. ATTORNEY BELIEVES MAKES THE CONDUCT CRIMINAL. IT WILL IDENTIFY THE CRIMINAL STATUTES THAT HAVE ALLEGEDLY BEEN

VIOLATED.

THE FOREPERSON, UPON THE GRAND JURY VOTING TO RETURN THE INDICTMENT, WILL THEN ENDORSE OR SIGN THE INDICTMENT, WHAT'S CALLED A TRUE BILL OF INDICTMENT. THERE'S A SPACE PROVIDED BY THE WORD -- OR FOLLOWED BY THE WORD "FOREPERSON." THE FOREPERSON IS TO SIGN THE INDICTMENT IF THE GRAND JURY BELIEVES THAT THERE'S PROBABLE CAUSE. A TRUE BILL SIGNIFIES THAT 12 OR MORE GRAND JURORS HAVE AGREED THAT THE CASE OUGHT TO GO FORWARD WITH PROBABLE CAUSE TO BELIEVE THAT THE PERSON PROPOSED FOR THE CHARGE IS GUILTY OF THE CRIME.

IT'S THE DUTY OF THE FOREPERSON TO ENDORSE OR SIGN EVERY INDICTMENT VOTED ON BY AT LEAST 12 MEMBERS EVEN IF THE FOREPERSON HAS VOTED AGAINST RETURNING THE INDICTMENT. SO IF YOU'VE BEEN DESIGNATED A FOREPERSON OR AN ASSISTANT FOREPERSON, EVEN IF YOU VOTED THE OTHER WAY OR YOU'RE OUT-VOTED, IF THERE'S AT LEAST 12 WHO VOTED FOR THE INDICTMENT, THEN YOU MUST SIGN THE INDICTMENT.

IF YOU WERE THE 12 MEMBERS OF THE GRAND JURY WHO VOTED IN FAVOR OF THE INDICTMENT, THEN THE FOREPERSON WILL ENDORSE THE INDICTMENT WITH THESE WORDS: "NOT A TRUE BILL." THEY'LL RETURN IT TO THE COURT. THE COURT WILL IMPOUND IT.

THE INDICTMENTS WHICH HAVE BEEN ENDORSED AS A TRUE BILL ARE PRESENTED EITHER TO ONE OF OUR MAGISTRATE JUDGES OR TO A DISTRICT JUDGE IN OPEN COURT BY YOUR FOREPERSON AT THE CONCLUSION OF EACH SESSION OF THE GRAND JURY. THIS IS THE

PROCEDURE THAT YOU HEARD ME ALLUDE TO. IN THE ABSENCE OF THE FOREPERSON, THE DEPUTY FOREPERSON SHALL PERFORM ALL THE FUNCTIONS AND DUTIES OF THE FOREPERSON.

LET ME EMPHASIZE AGAIN IT'S EXTREMELY IMPORTANT FOR THOSE OF YOU WHO ARE GRAND JURORS TO REALIZE THAT UNDER OUR CONSTITUTION, THE GRAND JURY IS AN INDEPENDENT BODY. IT'S INDEPENDENT OF THE UNITED STATES ATTORNEY. IT'S NOT AN ARM OR AN AGENT OF FEDERAL BUREAU OF INVESTIGATION OF THE DRUG ENFORCEMENT ADMINISTRATION, THE IRS, OR ANY OTHER GOVERNMENT AGENCY CHARGED WITH PROSECUTING THE CRIME.

I USED THE CHARACTERIZATION EARLIER THAT YOU STAND AS A BUFFER BETWEEN OUR GOVERNMENT'S ABILITY TO ACCUSE SOMEONE OF A CRIME AND THEN PUTTING THAT PERSON THROUGH THE BURDEN OF STANDING TRIAL. YOU ACT AS AN INDEPENDENT BODY OF CITIZENS.

IN RECENT YEARS, THERE HAS BEEN CRITICISM OF THE INSTITUTION OF THE GRAND JURY. THE CRITICISM GENERALLY IS THE GRAND JURY ACTS AS RUBBER STAMPS AND APPROVES PROSECUTIONS THAT ARE BROUGHT BY THE GOVERNMENT WITHOUT THOUGHT.

INTERESTINGLY ENOUGH, IN MY DISCUSSION WITH PROSPECTIVE GRAND JURORS, WE HAD ONE FELLOW WHO SAID, "YEAH, THAT'S THE WAY I THINK IT OUGHT TO BE." WELL, THAT'S NOT THE WAY IT IS. AS A PRACTICAL MATTER, YOU WILL WORK CLOSELY WITH GOVERNMENT LAWYERS. THE U.S. ATTORNEY AND THE ASSISTANT U.S. ATTORNEYS WILL PROVIDE YOU WITH IMPORTANT SERVICES AND HELP YOU FIND YOUR WAY WHEN YOU'RE CONFRONTED WITH COMPLEX LEGAL

MATTERS. IT'S ENTIRELY PROPER THAT YOU SHOULD RECEIVE THE ASSISTANCE FROM THE GOVERNMENT LAWYERS.

BUT AT THE END OF THE DAY, THE DECISION ABOUT WHETHER A CASE GOES FORWARD AND AN INDICTMENT SHOULD BE RETURNED IS YOURS AND YOURS ALONE. IF PAST EXPERIENCE IS ANY INDICATION OF WHAT TO EXPECT IN THE FUTURE, THEN YOU CAN EXPECT THAT THE U.S. ATTORNEYS THAT WILL APPEAR IN FRONT OF YOU WILL BE CANDID, THEY'LL BE HONEST, THAT THEY'LL ACT IN GOOD FAITH IN ALL MATTERS PRESENTED TO YOU.

HOWEVER, AS I SAID, ULTIMATELY YOU HAVE TO DEPEND ON YOUR INDEPENDENT JUDGMENT IN MAKING THE DECISION THAT YOU ARE CHARGED WITH MAKING AS GRAND JURORS. YOU'RE NOT AN ARM OF THE U.S. ATTORNEY'S OFFICE. YOU'RE NOT AN ARM OF ANY GOVERNMENT AGENCY. THE GOVERNMENT'S LAWYERS ARE PROSECUTORS, AND YOU'RE NOT.

IF THE FACTS SUGGEST TO YOU THAT YOU SHOULD NOT INDICT, THEN YOU SHOULD NOT DO SO EVEN IN THE FACE OF OPPOSITION OR STATEMENTS OR ARGUMENTS FROM ONE OF THE ASSISTANT UNITED STATES ATTORNEYS. YOU SHOULD NOT SURRENDER AN HONESTLY OR CONSCIOUSLY HELD BELIEF WITHOUT THE WEIGHT OF THE EVIDENCE AND SIMPLY DEFER TO THE U.S. ATTORNEY. THAT'S YOUR DECISION TO MAKE.

JUST AS YOU MUST MAINTAIN YOUR INDEPENDENCE IN YOUR DEALINGS WITH GOVERNMENT LAWYERS, YOUR DEALINGS WITH THE COURT MUST BE ON A FORMAL BASIS, ALSO. IF YOU HAVE A QUESTION FOR

THE COURT OR A DESIRE TO MAKE A PRESENTMENT OR A RETURN OF AN INDICTMENT TO THE COURT, THEN YOU MAY CONTACT ME THROUGH MY CLERK. YOU'LL BE ABLE TO ASSEMBLE IN THE COURTROOM OFTENTIMES FOR THESE PURPOSES.

LET ME TELL YOU ALSO THAT EACH GRAND JUROR IS DIRECTED TO REPORT IMMEDIATELY TO THE COURT ANY ATTEMPT BY ANYBODY UNDER ANY PRETENSE WHATSOEVER TO ADDRESS YOU OR CONTACT YOU FOR THE PURPOSE OF TRYING TO GAIN INFORMATION ABOUT WHAT'S GOING ON IN FRONT OF THE GRAND JURY. THAT SHOULD NOT HAPPEN. IF IT DOES HAPPEN, I SHOULD BE INFORMED OF THAT IMMEDIATELY BY ANY OF YOU, COLLECTIVELY OR INDIVIDUALLY. IF ANY PERSON CONTACTS YOU OR ATTEMPTS TO INFLUENCE YOU IN ANY MANNER IN CARRYING OUT YOUR DUTIES AS A GRAND JUROR, LET ME KNOW ABOUT IT.

LET ME TALK A LITTLE BIT MORE ABOUT THE OBLIGATION OF SECRECY, WHICH I'VE MENTIONED AND ALLUDED TO. AS I TOLD YOU BEFORE, THE HALLMARK OF THE GRAND JURY, PARTICULARLY OUR FEDERAL GRAND JURY, IS THAT IT OPERATES SECRETLY. IT OPERATES IN SECRECY, AND ITS PROCEEDINGS ARE ENTIRELY SECRET.

YOUR PROCEEDINGS AS GRAND JURORS ARE ALWAYS SECRET, AND THEY MUST REMAIN SECRET PERMANENTLY UNLESS AND UNTIL THE COURT DETERMINES OTHERWISE. YOU CAN'T RELATE TO YOUR FAMILY, THE NEWS MEDIA, TELEVISION REPORTERS, OR TO ANYONE WHAT HAPPENED IN FRONT OF THE GRAND JURY. IN FACT, TO DO SO IS TO COMMIT A CRIMINAL OFFENSE. YOU COULD BE HELD CRIMINALLY

LIABLE FOR REVEALING WHAT OCCURRED IN FRONT OF THE GRAND JURY.

THERE ARE SEVERAL IMPORTANT REASONS WHY WE DEMAND SECRECY IN THE INSTITUTION OF THE GRAND JURY. FIRST -- AND I MENTIONED THIS, AND THIS IS OBVIOUS -- THE PREMATURE DISCLOSURE OF INFORMATION THAT THE GRAND JURY IS ACTING ON COULD VERY WELL FRUSTRATE THE ENDS OF JUSTICE IN PARTICULAR CASES. IT MIGHT GIVE AN OPPORTUNITY FOR SOMEONE WHO'S ACCUSED OF A CRIME TO ESCAPE OR BECOME A FUGITIVE OR TO DESTROY EVIDENCE THAT MIGHT OTHERWISE BE UNCOVERED LATER ON. YOU DON'T WANT TO DO THAT.

IN THE COURSE OF AN INVESTIGATION, IT'S ABSOLUTELY IMPERATIVE THAT THE INVESTIGATION AND THE FACTS OF THE INVESTIGATION REMAIN SECRET, AND YOU SHOULD KEEP THAT FOREMOST IN YOUR MIND. ALSO, IF THE TESTIMONY OF A WITNESS IS DISCLOSED, THE WITNESS MAY BE SUBJECT TO INTIMIDATION OR SOMETIMES RETALIATION OR BODILY INJURY BEFORE THE WITNESS IS ABLE TO TESTIFY. IT IS SOMETHING THAT THE LAW ENFORCEMENT -- IT'S SOMETIMES THE CASE THAT LAW ENFORCEMENT WILL TELL A WITNESS WHO IS COOPERATING WITH AN INVESTIGATION THAT THEIR SECRECY IS GUARANTEED. IT SOMETIMES TAKES THAT KIND OF ASSURANCE FROM THE POLICE OR LAW ENFORCEMENT AGENTS TO GET A WITNESS TO TELL WHAT THEY KNOW. AND THAT GUARANTEE CAN ONLY BE SECURED IF YOU MAINTAIN THE OBLIGATION OF SECRECY.

THE GRAND JURY IS FORBIDDEN BY LAW FROM DISCLOSING ANY INFORMATION ABOUT THE GRAND JURY PROCESS WHATSOEVER. IT'S

ON THE BASIS SOMETIMES OF REPRESENTATIONS LIKE THAT RELUCTANT WITNESSES DO COME FORWARD. AGAIN, IT UNDERSCORES THE IMPORTANCE OF SECRECY.

AS I'VE ALSO MENTIONED, THE REQUIREMENT OF SECRECY PROTECTS INNOCENT PEOPLE WHO MAY HAVE COME UNDER INVESTIGATION, BUT WHO ARE CLEARED BY THE ACTIONS OF THE GRAND JURY. IT'S A TERRIBLE THING TO BE IMPROPERLY ACCUSED OF A CRIME. IT'S LIKE A SCARLET LETTER THAT PEOPLE SOMETIMES WEAR FOREVER. IT'S WORSE IF THE CRIME OR THE ACCUSATION NEVER BECOMES FORMAL. JUST THE IDEA THAT SOMEONE IS UNDER INVESTIGATION CAN HAVE DISASTROUS CONSEQUENCES FOR THAT PERSON OR HIS OR HER BUSINESS OR HIS OR HER FAMILY. THIS IS ANOTHER IMPORTANT REASON WHY THE GRAND JURY PROCEEDINGS MUST REMAIN SECRET.

IN THE EYES OF SOME PEOPLE, INVESTIGATION BY THE GRAND JURY ALONE CARRIES WITH IT THE STIGMA OR SUGGESTION OF GUILT. SO GREAT INJURY CAN BE DONE TO A PERSON'S GOOD NAME EVEN THOUGH ULTIMATELY YOU DECIDE THAT THERE'S NO EVIDENCE SUPPORTING AN INDICTMENT OF THE PERSON.

TO ENSURE THE SECRECY OF THE GRAND JURY PROCEEDINGS, THE LAW PROVIDES THAT ONLY AUTHORIZED PEOPLE MAY BE IN THE GRAND JURY ROOM WHILE EVIDENCE IS BEING PRESENTED. AS I'VE MENTIONED TO YOU NOW SEVERAL TIMES, THE ONLY PEOPLE WHO MAY BE PRESENT DURING THE FUNCTIONING OF THE GRAND JURY ARE THE GRAND JURORS THEMSELVES, THE UNITED STATES ATTORNEY OR AN ASSISTANT

WHO'S PRESENTING THE CASE, A WITNESS WHO IS THEN UNDER EXAMINATION, A COURT REPORTER, AND AN INTERPRETER, IF NECESSARY. ALL THE OTHERS EXCEPT THE GRAND JURORS GO OUT DURING THE DELIBERATION AND VOTING.

YOU MAY DISCLOSE TO THE U.S. ATTORNEY WHO IS ASSISTING THE GRAND JURY CERTAIN INFORMATION. AS I SAID, IF YOU HAVE QUESTIONS, IF GRAND JURORS HAVE QUESTIONS THAT THEY WANT ANSWERED, OBVIOUSLY THAT INFORMATION IS TO BE CONVEYED TO THE U.S. ATTORNEY TO GET THE QUESTIONS ANSWERED.

BUT YOU SHOULD NOT DISCLOSE THE CONTEXT OF YOUR DELIBERATIONS OR THE VOTE OF ANY PARTICULAR GRAND JUROR TO ANYONE, EVEN THE GOVERNMENT LAWYERS, ONCE THE VOTE HAS BEEN DONE. THAT'S ONLY THE BUSINESS OF THE GRAND JURY. IN OTHER WORDS, YOU'RE NOT TO INFORM THE GOVERNMENT LAWYER WHO VOTED ONE WAY ON THE INDICTMENT AND WHO VOTED THE OTHER WAY.

LET ME CONCLUDE NOW -- I APPRECIATE YOUR PATIENCE, AND IT'S BEEN A LONG SESSION THIS MORNING -- BY SAYING THAT THE IMPORTANCE OF THE SERVICE YOU PERFORM IS DEMONSTRATED BY THE VERY IMPORTANT AND COMPREHENSIVE OATH WHICH YOU TOOK A SHORT WHILE AGO. IT'S AN OATH THAT IS ROOTED IN OUR HISTORY AS A COUNTRY. THOUSANDS OF PEOPLE BEFORE YOU HAVE TAKEN A SIMILAR OATH. AND AS GOOD CITIZENS, YOU SHOULD BE PROUD TO HAVE BEEN SELECTED TO ASSIST IN THE ADMINISTRATION OF JUSTICE.

IT HAS BEEN MY PLEASURE TO MEET YOU. I WOULD BE HAPPY TO SEE YOU IN THE FUTURE IF THE NEED ARISES. AT THIS

POINT, THE U.S. ATTORNEY, MR. ROBINSON, WILL ASSIST YOU IN FURTHER ORGANIZATION. SO THIS PART OF THE ADMINISTRATION OF YOUR RESPONSIBILITY AS GRAND JURORS INVOLVING THE COURT IS OVER.

IT MIGHT BE APPROPRIATE TO TAKE A BREAK BEFORE WE GO ON TO THE NEXT PROCEEDING. I'VE HELD THESE FOLKS FOR A LONG TIME.

LADIES AND GENTLEMEN, MY GREAT PLEASURE TO MEET ALL OF YOU. GOOD LUCK WITH YOUR GRAND JURY SERVICE. I THINK YOU'LL FIND IT REWARDING AND INTERESTING AND COMPELLING.

--OOO--

I HEREBY CERTIFY THAT THE TESTIMONY ADDUCED IN THE FOREGOING MATTER IS A TRUE RECORD OF SAID PROCEEDINGS.

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APPENDIX 2

Grand Jury Voir Dire Transcript

PROSPECTIVE JUROR: MY NAME IS [redacted]. I LIVE IN SAN DIEGO IN THE MISSION HILLS AREA. I'M RETIRED. I WAS A CLINICAL SOCIAL WORKER. I'M SINGLE. NO CHILDREN. I'VE BEEN CALLED FOR JURY SERVICE A NUMBER OF TIMES, BUT I'VE NEVER ACTUALLY BEEN SELECTED AS A JUROR. CAN I BE FAIR? I'LL TRY. BECAUSE OF THE NATURE OF THE WORK THAT I DID, I HAVE SOME FAIRLY STRONG OPINIONS ABOUT SOME OF THE PEOPLE WHO COME INTO THE LEGAL SYSTEM. BUT I WOULD TRY TO WORK WITH THAT.

THE COURT: WE'RE ALL PRODUCTS OF OUR EXPERIENCE. WE'RE NOT GOING TO TRY TO DISABUSE YOU OF EXPERIENCES OR JUDGMENTS THAT YOU HAVE. WHAT WE ASK IS THAT YOU NOT ALLOW THOSE TO CONTROL INVARIABLY THE OUTCOME OF THE CASES COMING IN FRONT OF YOU; THAT YOU LOOK AT THE CASES FRESH, YOU EVALUATE THE CIRCUMSTANCES, LISTEN TO THE WITNESS TESTIMONY, AND THEN MAKE AN INDEPENDENT JUDGMENT.

DO YOU THINK YOU CAN DO THAT?

PROSPECTIVE JUROR: I'LL DO MY BEST.

THE COURT: IS THERE A CERTAIN CATEGORY OF CASE THAT YOU THINK MIGHT BE TROUBLESOME FOR YOU TO SIT ON THAT YOU'D BE INSTINCTIVELY TILTING ONE WAY IN FAVOR OF INDICTMENT OR THE OTHER WAY AGAINST INDICTING JUST BECAUSE OF THE NATURE OF THE CASE?

PROSPECTIVE JUROR: WELL, I HAVE SOME FAIRLY STRONG FEELINGS REGARDING DRUG CASES. I DO NOT BELIEVE THAT ANY DRUGS SHOULD BE CONSIDERED ILLEGAL, AND I THINK WE'RE SPENDING A LOT OF TIME AND ENERGY PERSECUTING AND PROSECUTING CASES WHERE RESOURCES SHOULD BE DIRECTED IN OTHER AREAS.

I ALSO HAVE STRONG FEELINGS ABOUT IMMIGRATION CASES. AGAIN, I THINK WE'RE SPENDING A LOT OF TIME PERSECUTING PEOPLE THAT WE SHOULD NOT BE.

THE COURT: WELL, LET ME TELL YOU, YOU'VE HIT ON THE TWO TYPES OF CASES THAT ARE REALLY KIND OF THE STAPLE OF THE WORK WE DO HERE IN THE SOUTHERN DISTRICT OF CALIFORNIA. AS I MENTIONED IN MY INITIAL REMARKS, OUR PROXIMITY TO THE BORDER KIND OF MAKES US A FUNNEL FOR BOTH DRUG CASES AND IMMIGRATION CASES. YOU'RE GOING TO BE HEARING THOSE CASES I CAN TELL YOU FOR SURE. JUST AS DAY FOLLOWS NIGHT, YOU'RE HEAR CASES LIKE THAT.

NOW, THE QUESTION IS CAN YOU FAIRLY EVALUATE THOSE CASES? JUST AS THE DEFENDANT ULTIMATELY IS ENTITLED TO A FAIR TRIAL AND THE PERSON THAT'S ACCUSED IS ENTITLED TO A FAIR

APPRAISAL OF THE EVIDENCE OF THE CASE THAT'S IN FRONT OF YOU, SO, TOO, IS THE UNITED STATES ENTITLED TO A FAIR JUDGMENT. IF THERE'S PROBABLE CAUSE, THEN THE CASE SHOULD GO FORWARD. I WOULDN'T WANT YOU TO SAY, "WELL, YEAH, THERE'S PROBABLE CAUSE. BUT I STILL DON'T LIKE WHAT OUR GOVERNMENT IS DOING. I DISAGREE WITH THESE LAWS, SO I'M NOT GOING TO VOTE FOR IT TO GO FORWARD." IF THAT'S YOUR FRAME OF MIND, THEN PROBABLY YOU SHOULDN'T SERVE. ONLY YOU CAN TELL ME THAT.

PROSPECTIVE JUROR: WELL, I THINK I MAY FALL IN THAT CATEGORY.

THE COURT: IN THE LATTER CATEGORY?

PROSPECTIVE JUROR: YES.

THE COURT: WHERE IT WOULD BE DIFFICULT FOR YOU TO SUPPORT A CHARGE EVEN IF YOU THOUGHT THE EVIDENCE WARRANTED IT?

PROSPECTIVE JUROR: YES.

THE COURT: I'M GOING TO EXCUSE YOU, THEN. I APPRECIATE YOUR HONEST ANSWERS.

PROSPECTIVE JUROR: MAY NAME IS [redacted]. I LIVE IN SAN DIEGO. I'M A REAL ESTATE AGENT. NOT MARRIED. NO KIDS. HAVE NOT SERVED. AND AS FAR AS BEING FAIR, IT KIND OF DEPENDS UPON WHAT THE CASE IS ABOUT BECAUSE THERE IS A DISPARITY BETWEEN STATE AND FEDERAL LAW.

THE COURT: IN WHAT REGARD?

PROSPECTIVE JUROR: SPECIFICALLY, MEDICAL MARIJUANA.

THE COURT: WELL, THOSE THINGS -- THE CONSEQUENCES OF YOUR DETERMINATION SHOULDN'T CONCERN YOU IN THE SENSE THAT PENALTIES OR PUNISHMENT, THINGS LIKE THAT -- WE TELL TRIAL JURORS, OF COURSE, THAT THEY CANNOT CONSIDER THE PUNISHMENT OR

THE CONSEQUENCE THAT CONGRESS HAS SET FOR THESE THINGS. WE'D ASK YOU TO ALSO ABIDE BY THAT. WE WANT YOU TO MAKE A BUSINESS-LIKE DECISION AND LOOK AT THE FACTS AND MAKE A DETERMINATION OF WHETHER THERE WAS A PROBABLE CAUSE.

COULD YOU DO THAT? COULD YOU PUT ASIDE STRONG PERSONAL FEELINGS YOU MAY HAVE?

PROSPECTIVE JUROR: IT DEPENDS. I HAVE A VERY STRONG OPINION ON IT. WE LIVE IN THE STATE OF CALIFORNIA, NOT FEDERAL CALIFORNIA. THAT'S HOW I FEEL ABOUT IT VERY STRONGLY.

THE COURT: WELL, I DON'T KNOW HOW OFTEN MEDICAL MARIJUANA USE CASES COME UP HERE. I DON'T HAVE A GOOD FEEL FOR THAT. MY INSTINCT IS THEY PROBABLY DON'T ARISE VERY OFTEN. BUT I SUPPOSE ONE OF THE SOLUTIONS WOULD BE IN A CASE IMPLICATING MEDICAL USE OF MARIJUANA, YOU COULD RECUSE YOURSELF FROM THAT CASE.

ARE YOU WILLING TO DO THAT?

PROSPECTIVE JUROR: SURE.

THE COURT: ALL OTHER CATEGORIES OF CASES YOU COULD GIVE A FAIR, CONSCIENTIOUS JUDGMENT ON?

PROSPECTIVE JUROR: FOR THE MOST PART, BUT I ALSO FEEL THAT DRUGS SHOULD BE LEGAL.

THE COURT: OUR LAWS ARE DIFFERENT FROM THAT. AND AS YOU HEARD ME EXPLAIN TO [redacted], A LOT OF THE CASES THAT COME THROUGH IN OUR COURT ARE DRUG CASES. YOU'LL BE CALLED UPON TO EVALUATE THOSE CASES OBJECTIVELY AND THEN MAKE

THE TWO DETERMINATIONS THAT I STARTED OFF EXPLAINING TO [redacted]: "DO I HAVE A REASONABLE BELIEF THAT A CRIME WAS COMMITTED? WHETHER I AGREE WITH WHETHER IT OUGHT TO BE A CRIME OR NOT, DO I BELIEVE THAT A CRIME WAS COMMITTED AND THAT THE PERSON THAT THE GOVERNMENT IS ASKING ME TO INDICT WAS SOMEHOW INVOLVED IN THIS CRIME, EITHER COMMITTED IT OR HELPED WITH IT?"

COULD YOU DO THAT IF YOU SIT AS A GRAND JUROR?

PROSPECTIVE JUROR: THE LAST JURY I WAS ASKED TO SIT ON, I GOT EXCUSED BECAUSE OF THAT REASON.

THE COURT: YOU SAID YOU COULDN'T DO IT? YOUR SENTIMENTS ARE SO STRONG THAT THEY WOULD IMPAIR YOUR OBJECTIVITY ABOUT DRUG CASES?

PROSPECTIVE JUROR: I THINK RAPISTS AND MURDERERS OUGHT TO GO TO JAIL, NOT PEOPLE USING DRUGS.

THE COURT: I THINK RAPISTS AND MURDERERS OUGHT TO GO TO JAIL, TOO. IT'S NOT FOR ME AS A JUDGE TO SAY WHAT THE LAW IS. WE ELECT LEGISLATORS TO DO THAT. WE'RE SORT OF AT THE END OF THE PIPE ON THAT. WE'RE CHARGED WITH ENFORCING THE LAWS THAT CONGRESS GIVES US.

I CAN TELL YOU SOMETIMES I DON'T AGREE WITH SOME OF THE LEGAL DECISIONS THAT ARE INDICATED THAT I HAVE TO MAKE. BUT MY ALTERNATIVE IS TO VOTE FOR SOMEONE DIFFERENT, VOTE FOR SOMEONE THAT SUPPORTS THE POLICIES I SUPPORT AND GET THE LAW CHANGED. IT'S NOT FOR ME TO SAY, "WELL, I DON'T LIKE IT. SO

I'M NOT GOING TO FOLLOW IT HERE."

YOU'D HAVE A SIMILAR OBLIGATION AS A GRAND JUROR EVEN THOUGH YOU MIGHT HAVE TO GRIT YOUR TEETH ON SOME CASES. PHILOSOPHICALLY, IF YOU WERE A MEMBER OF CONGRESS, YOU'D VOTE AGAINST, FOR EXAMPLE, CRIMINALIZING MARIJUANA. I DON'T KNOW IF THAT'S IT, BUT YOU'D VOTE AGAINST CRIMINALIZING SOME DRUGS.

THAT'S NOT WHAT YOUR PREROGATIVE IS HERE. YOUR PREROGATIVE INSTEAD IS TO ACT LIKE A JUDGE AND TO SAY, "ALL RIGHT. THIS IS WHAT I'VE GOT TO DEAL WITH OBJECTIVELY. DOES IT SEEM TO ME THAT A CRIME WAS COMMITTED? YES. DOES IT SEEM TO ME THAT THIS PERSON'S INVOLVED? IT DOES." AND THEN YOUR OBLIGATION, IF YOU FIND THOSE THINGS TO BE TRUE, WOULD BE TO VOTE IN FAVOR OF THE CASE GOING FORWARD.

I CAN UNDERSTAND IF YOU TELL ME "LOOK, I GET ALL THAT, BUT I JUST CAN'T DO IT OR I WOULDN'T DO IT." I DON'T KNOW WHAT YOUR FRAME OF MIND IS. YOU HAVE TO TELL ME ABOUT THAT.

PROSPECTIVE JUROR: I'M NOT COMFORTABLE WITH IT.

THE COURT: DO YOU THINK YOU'D BE INCLINED TO LET PEOPLE GO ON DRUG CASES EVEN THOUGH YOU WERE CONVINCED THERE WAS PROBABLE CAUSE THEY COMMITTED A DRUG OFFENSE?

PROSPECTIVE JUROR: IT WOULD DEPEND UPON THE CASE.

THE COURT: IS THERE A CHANCE THAT YOU WOULD DO THAT?

PROSPECTIVE JUROR: YES.

THE COURT: I APPRECIATE YOUR ANSWERS. I'LL EXCUSE YOU AT THIS TIME.

PROSPECTIVE JUROR: I'M [redacted]. I LIVE IN ENCINITAS. I WORK FOR AN INSURANCE COMPANY HERE IN SAN DIEGO. I'M MARRIED. MY WIFE IS A P.E. TEACHER AT A MIDDLE SCHOOL. I HAVE TWO KIDS AGE 14 AND 16. I'VE BEEN A JUROR BEFORE PROBABLY TEN YEARS AGO ON KIND OF A LOW-LEVEL CRIMINAL CASE. AND IN THE NAME OF FULL DISCLOSURE, I'D PROBABLY SUGGEST I'D BE THE FLIPSIDE OF SOME OF THE INDIVIDUALS WHO HAVE CONVEYED THEIR CONCERNS PREVIOUSLY. I HAVE A STRONG BIAS FOR THE U.S. ATTORNEY, WHATEVER CASES THEY MIGHT BRING. I DON'T THINK THEY'RE HERE TO WASTE OUR TIME, THE COURT'S TIME, THEIR OWN TIME. I APPRECIATE THE EVIDENTIARY STANDARDS, I GUESS, MORE OR LESS, AS A LAYPERSON WOULD; THAT THEY ARE CALLED UPON IN ORDER TO BRING THESE CASES OR SEEK AN INDICTMENT.

AND THE GATEKEEPER ROLE THAT I GUESS WE'RE BEING ASKED TO PLAY IS ONE THAT I'D HAVE A DIFFICULT TIME, IN ALL HONESTY. I'M PROBABLY SUGGESTING THAT THE U.S. ATTORNEY'S CASE WOULD BE ONE THAT I WOULD BE WILLING TO STAND IN FRONT

OF; IN OTHER WORDS, PREVENT FROM GOING TO A JURY.

THE COURT: IT SOMETIMES HAPPENS THAT AT THE TIME THE CASE IS INITIALLY PRESENTED TO THE U.S. ATTORNEY'S OFFICE, THINGS APPEAR DIFFERENTLY THAN 10 DAYS LATER, 20 DAYS LATER WHEN IT'S PRESENTED TO A GRAND JURY. THAT'S WHY THIS GATEKEEPER ROLE IS VERY, VERY IMPORTANT.

YOU'RE NOT PART OF THE PROSECUTING ARM. YOU'RE INTENDED TO BE A BUFFER INDEPENDENT OF THE U.S. ATTORNEY'S OFFICE. AND THE REAL ROLE OF THE GRAND JURY IS TO MAKE SURE THAT UNSUBSTANTIATED CHARGES DON'T GO FORWARD.

YOU'VE HEARD MY GENERAL COMMENTS. YOU HAVE AN APPRECIATION ABOUT HOW AN UNSUBSTANTIATED CHARGE COULD CAUSE PROBLEMS FOR SOMEONE EVEN IF THEY'RE ULTIMATELY ACQUITTED.

YOU APPRECIATE THAT; RIGHT?

PROSPECTIVE JUROR: I THINK I COULD APPRECIATE THAT, YES.

THE COURT: AND SO WE'RE -- LOOK, I'LL BE HONEST WITH YOU. THE GREAT MAJORITY OF THE CHARGES THAT THE GRAND JURY PASSES ON THAT ARE PRESENTED BY THE U.S. ATTORNEY'S OFFICE DO GO FORWARD. MOST OF THE TIME, THE GRAND JURY PUTS ITS SEAL OF APPROVAL ON THE INITIAL DECISION MADE BY THE U.S. ATTORNEY.

OBVIOUSLY, I WOULD SCREEN SOMEBODY OUT WHO SAYS, "I DON'T CARE ABOUT THE EVIDENCE. I'M NOT GOING TO PAY ATTENTION TO THE EVIDENCE. IF THE U.S. ATTORNEY SAYS IT'S GOOD, I'M

GOING TO GO WITH THAT." IT DIDN'T SOUND LIKE THAT'S WHAT YOU WERE SAYING. YOU WERE SAYING YOU GIVE A PRESUMPTION OF GOOD FAITH TO THE U.S. ATTORNEY AND ASSUME, QUITE LOGICALLY, THAT THEY'RE NOT ABOUT THE BUSINESS OF TRYING TO INDICT INNOCENT PEOPLE OR PEOPLE THAT THEY BELIEVE TO BE INNOCENT OR THE EVIDENCE DOESN'T SUBSTANTIATE THE CHARGES AGAINST. THAT'S WELL AND GOOD.

YOU MUST UNDERSTAND THAT AS A MEMBER OF THE GRAND JURY, YOU'RE THE ULTIMATE ARBITER. THEY DON'T HAVE THE AUTHORITY TO HAVE A CASE GO FORWARD WITHOUT YOU AND FELLOW GRAND JURORS' APPROVAL. I WOULD WANT YOU NOT TO JUST AUTOMATICALLY DEFER TO THEM OR SURRENDER THE FUNCTION AND GIVER THE INDICTMENT DECISION TO THE U.S. ATTORNEY. YOU HAVE TO MAKE THAT INDEPENDENTLY.

YOU'RE WILLING TO DO THAT IF YOU'RE RETAINED HERE?

PROSPECTIVE JUROR: I'M NOT A PERSON THAT THINKS OF ANYBODY IN THE BACK OF A POLICE CAR AS NECESSARILY GUILTY, AND I WOULD DO MY BEST TO GO AHEAD AND BE OBJECTIVE. BUT AGAIN, JUST IN THE NAME OF FULL DISCLOSURE, I FELT LIKE I SHOULD LET YOU KNOW THAT I HAVE A VERY STRONG PRESUMPTION WITH RESPECT TO ANY DEFENDANT THAT WOULD BE BROUGHT IN FRONT OF US.

THE COURT: I UNDERSTAND WHAT YOU'RE SAYING. LET ME TELL YOU THE PROCESS WILL WORK MECHANICALLY. THEY'RE GOING TO CALL WITNESSES. AND WHAT THEY'RE GOING TO ASK YOU TO DO IS EVALUATE THE TESTIMONY YOU HEAR FROM WITNESSES.

BEFORE YOU REACH A POINT WHERE YOU VOTE ON ANY INDICTMENT, THE U.S. ATTORNEY AND THE STENOGRAPHER LEAVE. THE ONLY PEOPLE LEFT WHEN THE VOTE IS TAKEN ARE THE GRAND JURORS THEMSELVES. THAT'S THE WAY THE PROCESS IS GOING TO WORK.

YOU'RE GOING TO HAVE TO SAY EITHER "WELL, IT HAS THE RING OF TRUTH TO ME, AND I THINK IT HAPPENED THE WAY IT'S BEING SUGGESTED HERE. AT LEAST I'M CONVINCED ENOUGH TO LET THE CASE GO FORWARD" OR "THINGS JUST DON'T HAPPEN LIKE THAT IN MY EXPERIENCE, AND I THINK THIS SOUNDS CRAZY TO ME. I WANT EITHER MORE EVIDENCE OR I'M NOT CONVINCED BY WHAT'S BEEN PRESENTED AND I'M NOT GOING TO LET IT GO FORWARD."

CAN YOU MAKE AN OBJECTIVE ON FACTS LIKE THE ONES I'VE JUST DESCRIBED?

PROSPECTIVE JUROR: I WOULD DO MY BEST TO DO THAT. I CERTAINLY WOULD WANT ME SITTING ON A GRAND JURY IF I WERE A DEFENDANT COMING BEFORE THIS GRAND JURY. HAVING SAID THAT, I WOULD DO MY BEST. I HAVE TO ADMIT TO A STRONG BIAS IN FAVOR OF THE U.S. ATTORNEY THAT I'M NOT SURE I COULD OVERCOME.

THE COURT: ALL I'M TRYING TO GET AT IS WHETHER YOU'RE GOING TO AUTOMATICALLY VOTE TO INDICT IRRESPECTIVE OF THE FACTS.

A FEW YEARS AGO, I IMPANELED A FELLOW HERE THAT WAS A SERGEANT ON THE SHERIFF'S DEPARTMENT. AND YEARS AGO WHEN I WAS A PROSECUTOR, I WORKED WITH HIM. HE WAS ALL ABOUT ARRESTING AND PROSECUTING PEOPLE. BUT WHEN HE GOT HERE, HE

SAID, "LOOK, I UNDERSTAND THAT THIS IS A DIFFERENT FUNCTION. I CAN PERFORM THAT FUNCTION." HE SERVED FAITHFULLY AND WELL FOR A NUMBER OF -- OVER A YEAR, I THINK. 18 MONTHS, MAYBE. HE EVENTUALLY GOT A PROMOTION, SO WE RELIEVED HIM FROM THE GRAND JURY SERVICE.

BUT, YOU KNOW, HE TOOK OFF ONE HAT AND ONE UNIFORM AND PUT ON A DIFFERENT HAT ON THE DAYS HE REPORTED TO THE GRAND JURY. HE WAS A POLICEMAN. HE'D BEEN INVOLVED IN PROSECUTING CASES. BUT HE UNDERSTOOD THAT THE FUNCTION HE WAS PERFORMING HERE WAS DIFFERENT, THAT IT REQUIRED HIM TO INDEPENDENTLY AND OBJECTIVELY ANALYZE CASES AND ASSURED ME THAT HE COULD DO THAT, THAT HE WOULD NOT AUTOMATICALLY VOTE TO INDICT JUST BECAUSE THE U.S. ATTORNEY SAID SO.

AGAIN, I DON'T WANT TO PUT WORDS IN YOUR MOUTH. BUT I DON'T HEAR YOU SAYING THAT THAT'S THE EXTREME POSITION THAT YOU HAVE. I HEAR YOU SAYING INSTEAD THAT COMMON SENSE AND YOUR EXPERIENCE TELLS YOU THE U.S. ATTORNEY'S NOT GOING TO WASTE TIME ON CASES THAT LACK MERIT. THE CONSCIENTIOUS PEOPLE WHO WORK FOR THE U.S. ATTORNEY'S OFFICE AREN'T GOING TO TRY TO TRUMP UP PHONY CHARGES AGAINST PEOPLE.

MY ANECDOTAL EXPERIENCE SUPPORTS THAT, TOO. THAT DOESN'T MEAN THAT EVERY CASE THAT COMES IN FRONT OF ME I SAY, "WELL, THE U.S. ATTORNEY'S ON THIS. THE PERSON MUST BE GUILTY." I CAN'T DO THAT. I LOOK AT THE CASES STAND-ALONE, INDEPENDENT, AND I EVALUATE THE FACTS. I DO WHAT I'M CHARGED

WITH DOING, WHICH IS MAKING A DECISION BASED ON THE EVIDENCE THAT'S PRESENTED.

SO THAT'S THE QUESTION I HAVE FOR YOU. I CAN UNDERSTAND THE DEFERENCE TO THE U.S. ATTORNEY. AND FRANKLY, I AGREE WITH THE THINGS THAT YOU'RE SAYING. THEY MAKE SENSE TO ME. BUT AT THE END OF THE DAY, YOUR OBLIGATION IS STILL TO LOOK AT THESE CASES INDEPENDENTLY AND FORM AN INDEPENDENT CONSCIENTIOUS BUSINESS-LIKE JUDGMENT ON THE TWO QUESTIONS THAT I'VE MENTIONED EARLIER: DO I HAVE A REASONABLE BELIEF THAT A CRIME WAS COMMITTED? DO I HAVE A REASONABLE BELIEF THAT THE PERSON TO BE CHARGED COMMITTED IT OR HELPED COMMIT IT?

CAN YOU DO THAT?

PROSPECTIVE JUROR: AGAIN, I WOULD DO MY BEST TO DO THAT. BUT I DO BRING A VERY, VERY STRONG BIAS. I BELIEVE THAT, FOR EXAMPLE, THE U.S. ATTORNEY WOULD HAVE OTHER FACTS THAT WOULD RISE TO LEVEL THAT THEY'D BE ABLE TO PRESENT TO US THAT WOULD BEAR ON THE TRIAL. I WOULD LOOK AT THE CASE AND PRESUME AND BELIEVE THAT THERE ARE OTHER FACTS OUT THERE THAT AREN'T PRESENTED TO US THAT WOULD ALSO BEAR ON TAKING THE CASE TO TRIAL. I'D HAVE A VERY DIFFICULT TIME.

THE COURT: YOU WOULDN'T BE ABLE TO DO THAT. WE WOULDN'T WANT YOU TO SPECULATE THAT THERE'S OTHER FACTS THAT HAVEN'T BEEN PRESENTED TO YOU. YOU HAVE TO MAKE A DECISION BASED ON WHAT'S BEEN PRESENTED.

BUT LOOK, I CAN TELL YOU I IMAGINE THERE'S PEOPLE IN

THE U.S. ATTORNEY'S OFFICE THAT DISAGREE WITH ONE ANOTHER ABOUT THE MERITORIOUSNESS OF A CASE OR WHETHER A CASE CAN BE WON AT A JURY TRIAL.

IS THAT RIGHT, MR. ROBINSON?

MR. ROBINSON: ON OCCASION, YOUR HONOR. NOT VERY OFTEN.

THE COURT: IT COMES UP EVEN IN AN OFFICE WITH PEOPLE CHARGED WITH THE SAME FUNCTION. I DON'T WANT TO BEAT YOU UP ON THIS, [redacted] I'M EQUALLY CONCERNED WITH SOMEBODY WHO WOULD SAY, "I'M GOING TO AUTOMATICALLY DROP THE TRAP DOOR ON ANYBODY THE U.S ATTORNEY ASKS." I WOULDN'T WANT YOU TO DO THAT. IF YOU THINK THERE'S A POSSIBILITY YOU'LL DO THAT, THEN I'D BE INCLINED TO EXCUSE YOU.

PROSPECTIVE JUROR: I THINK THAT THERE'S A POSSIBILITY I WOULD BE INCLINED TO DO THAT.

THE COURT: I'M GOING TO EXCUSE YOU, THEN. THANK YOU. I APPRECIATE YOUR ANSWERS.

APPENDIX 3

Judge Moskowitz Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MANUEL MARTINEZ-COVARRUBIAS, Defendant.	CASE NO. 07cr0491 BTM **ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT**

Defendant Manuel Martinez-Covarrubias has filed a Motion to Dismiss the Indictment Due to Erroneous Grand Jury Instruction. For the reasons discussed below, Defendant's motion is **DENIED**.

I. BACKGROUND

On February 28, 2007, a federal grand jury empaneled in this district on January 11, 2007 returned a two-count Indictment charging Defendant with Importation of Methamphetamine, in violation of 21 U.S.C. §§ 952 and 960, and Possession of Methamphetamine with Intent to Distribute, in violation of 21 U.S.C. § 841(a)(1).

II. CHALLENGED INSTRUCTIONS

A. Video Presentation

Prior to the selection of the grand jury jury, the potential grand jurors were shown a video titled "The Federal Grand Jury: The People's Panel." The video's apparent purpose is to educate potential grand jurors about their civic duty to serve, the function of the grand jury, and their responsibilities as grand jurors.

The video presents the story of a woman who serves on a grand jury for the first time. In one scene, after the woman receives the summons, her son tells her what he has learned about the function of a grand jury. Reading from a civics book, the son states that if the "jury finds that probable cause does exist, then it will return a written statement of charges called an indictment . . . ."

When charging the impaneled grand jury, the fictional judge explains that if the grand jury finds that there is probable cause, "you will return an indictment."

Later, the foreperson tells the other grand jurors that there are two purposes of the grand jury: (1) when there is a finding of probable cause, to bring the accused to trial fairly and swiftly; and (2) to protect the innocent against unfounded prosecution.

B. Voir Dire Session

Before commencing voir dire, the empaneling judge, the Hon. Larry A. Burns, explained the function of the grand jury to the prospective jurors as follows: "The grand jury is determining really two factors: 'Do we have a reasonable – collectively, do we have a reasonable belief that a crime was committed? And second, do we have a reasonable belief that the person that they propose that we indict committed the crime?' If the answer is 'yes' to both of those, then the case should move forward. If the answer to either of the questions is 'no,' then the grand jury should hesitate and not indict." App. 2 to Gov't Response at 8.

During voir dire, Judge Burns explained to the potential grand jurors that the presentation of the evidence to the grand jury was going to be one-sided. Id. at 14. However, Judge Burns stated, "Now, having told you that, my experience is that the prosecutors don't play hide-the-ball. If there's something adverse or that cuts against the charge, you'll be informed of that. They have a duty to do that." Id. at 14-15.

One prospective juror, a retired clinical social worker, indicated that he did not believe that any drugs should be considered illegal. Id. at 16. He also stated that he had strong feelings about immigration cases and thought the government was spending a lot of time unnecessarily persecuting people. Id. The following exchange occurred:

The Court: Now, the question is can you fairly evaluate those cases? Just as the Defendant ultimately is entitled to a fair trial and the person that's accused is entitled to a fair appraisal of the evidence of the case that's in front of you, so, too, is the United States entitled to a fair judgment. If there's probable cause, then the case should go forward. I wouldn't want you to say, "Well, yeah, there's probable cause. But I still don't like what our Government is doing. I disagree with these laws, so I"m not going to vote for it to go forward." If that's your frame of mind, then probably you shouldn't serve. Only you can tell me that.

Prospective Juror: Well, I think I may fall in that category.

The Court: In the latter category?

Prospective Juror: Yes.

The Court: Where it would be difficult for you to support a charge even if you thought the evidence warranted it?

Prospective Juror: Yes.

The Court: I'm going to excuse you, then. I appreciate your honest answers.

Id. at 16-17.

Later, another prospective juror, a real estate agent, expressed a concern regarding the disparity between state and federal law with respect to medical marijuana. Judge Burns responded:

> Well, those things – the consequences of your determination shouldn't concern you in the sense that penalties or punishment, things like that – we tell trial jurors, of course, that they cannot consider the punishment or the consequence that Congress has set for these things. We'd ask you to also abide by that. We want you to make a business-like decision and look at the facts and make a determination of whether there was a [sic] probable cause.

Id. at 25.

Subsequently, the prospective juror stated that he felt that drugs should be legal and that rapists and murderers, not people using drugs, should go to jail. Id. at 25-26. The following exchange ensued:

The Court: I think rapists and murderers ought to go to jail too. It's not for me as a judge to say what the law is. We elect legislators to do that. We're sort of at the end of the pipe on that. We're charged with enforcing the laws that Congress gives us.

I can tell you sometimes I don't agree with some of the legal decisions that are indicated that I have to make. But my alternative is to vote for someone different, vote for someone that supports the policies I support and get the law changed. It's not for me to say, "Well, I don't like it. So I'm not going to follow it here."

You'd have a similar obligation as a grand juror even though you might

> have to grit your teeth on some cases. Philosophically, if you were a member of congress, you'd vote against, for example, criminalizing marijuana. I don't know if that's it but you'd vote against criminalizing some drugs.
>
> That's not what your prerogative is here. Your prerogative instead is to act like a judge and to say, "All right. This is what I've got to deal with objectively. Does it seem to me that a crime was committed? Yes. Does it seem to me that this person's involved? It does." And then your obligation, if you find those things to be true, would be to vote in favor of the case going forward.
>
> I can understand if you tell me, "Look, I get all that, but I just can't do it or I wouldn't do it." I don't know what your frame of mind is. You have to tell me about that.
>
> Prospective Juror: I'm not comfortable with it.
>
> The Court: Do you think you'd be inclined to let people go on drug cases even though you were convinced there was probable cause they committed a drug offense?
>
> Prospective Juror: It would depend upon the case.
>
> The Court: Is there a chance that you would do that?
>
> Prospective Juror: Yes.
>
> The Court: I appreciate your answers. I'll excuse you at this time.

Id. at 26-28.

Later, a potential juror said that he was "soft" on immigration because he had done volunteer work with immigrants in the field, but that he could be fair and objective. Judge Burns stated: "As you heard me explain earlier to one of the prospective grand jurors, we're not about trying to change people's philosophies and attitudes here. That's not my business. But what I have to insist on is that you follow the law that's given to us by the United States Congress. We enforce the federal laws here." Id. at 61. This juror was not excused.

C. Charge to Impaneled Grand Jury

After the grand jury was impaneled, Judge Burns gave further instructions regarding the responsibilities of the grand jurors.

With respect to the enforcement of federal laws, Judge Burns explained:

> But it's not for you to judge the wisdom of the criminal laws enacted by Congress; that is, whether or not there should be a federal law or should not be a federal law designating certain activity is [sic] criminal is not up to you. That's a judgment that Congress makes.
>
> And if you disagree with that judgment made by Congress, then your

> option is not to say, 'Well, I'm going to vote against indicting even though I think that the evidence is sufficient' or 'I'm going to vote in favor of [indictment] even though the evidence may be insufficient.' Instead, your obligation is to contact your congressman or advocate for a change in the laws, but not to bring your personal definition of what the law ought to be and try to impose that through applying it in a grand jury setting.
>
> Furthermore, when you're deciding whether to indict or not to indict, you shouldn't be concerned with punishment that attaches to the charge. I think I also alluded to this in the conversation with one gentleman. Judges alone determine punishment. We tell trial juries in criminal cases that they're not to be concerned with the matter of punishment either. Your obligation at the end of the day is to make a business-like decision on facts and apply those facts to the law as it's explained and read to you.

App. 1 to Gov't Response at 8-9.

With respect to exculpatory evidence, Judge Burns stated: "As I told you, in most instances, the U.S. Attorneys are duty-bound to present evidence that cuts against what they may be asking you to do if they're aware of that evidence." Id. at 20. Later, Judge Burns said, "If past experience is any indication of what to expect in the future, then you can expect that the U.S. Attorneys that will appear in front of you will be candid, they'll be honest, that they'll act in good faith in all matters presented to you." Id. at 27.

III. DISCUSSION

A. Instructions Re: Role of Grand Jury

Defendant contends that statements made in the video, Judge Burns' instructions, and the dismissal of two potential jurors deprived Defendant of the traditional functioning of the Grand Jury. Specifically, Defendant claims that the challenged statements in combination with the dismissal of the two potential jurors "flatly prohibited grand jurors from exercising their constitutional discretion to not indict even if probable cause supports the charge." (Def.'s Reply Br. 8.) Looking at the video presentation and the instructions as a whole, the Court disagrees.

Judge Burns made it clear that the jurors were not to refuse to indict in the face of probable cause *on the ground that they disagreed with Congress's decision to criminalize certain activity*. Judge Burns did not err in doing so. In United States v. Navarro-Vargas, 408

F.3d 1184 (9th Cir. 2005) ("Navarro-Vargas II"), the Ninth Circuit upheld the model grand jury instruction that states: "You cannot judge the wisdom of the criminal laws enacted by Congress, that is, whether or not there should or should not be a federal law designating certain activity as criminal. That is to be determined by Congress and not by you." The majority opinion observed that the instruction was not contrary to any long-standing historical practice surrounding the grand jury and noted that shortly after the adoption of the Bill of Rights, federal judges charged grand juries with a duty to submit to the law and to strictly enforce it. Id. at 1193,1202-03. "We cannot say that the grand jury's power to judge the wisdom of the laws is so firmly established that the district court must either instruct the jury on its power to nullify the laws or remain silent." Id. at 1204.

A prohibition against judging the wisdom of the criminal laws enacted by Congress amounts to the same thing as a prohibition against refusing to indict based on disagreement with the laws. It is true that Judge Burns used stronger language that, viewed in isolation, could be misconstrued as requiring the return of an indictment in *all* cases where probable cause can be found. Particularly troubling is the following statement made to the real estate agent: "Your prerogative instead is to act like a judge and to say, 'All right. This is what I've got to deal with objectively. Does it seem to me that a crime was committed? Yes. Does it seem to me that this person's involved? It does.' *And then your obligation*, if you find those things to be true, *would be to vote in favor of the case going forward*." App. 2 to Gov't Response at 26. However, viewed in context, Judge Burns was not mandating the issuance of an indictment in *all* cases where probable cause is found; he was explaining that disagreement with the laws should not be an obstacle to the issuance of an indictment.[1]

Furthermore, the word "obligation" is not materially different than the word "should."

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[1] The Supreme Court has recognized that a grand jury is not required to indict in every case where probable cause exists. In Vasquez v. Hillery, 474 U.S. 254, 263 (1986), the Supreme Court explained: "The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense - all on the basis of the same facts. Moreover, '[t]he grand jury is not bound to indict in every case where a conviction can be obtained.' United States v. Ciambrone, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)."

In Navarro-Vargas II, the majority opinion held that the model instruction that the jurors "should" indict if they find probable cause does not violate the grand jury's independence. The majority explained, "As a matter of pure semantics, it does not 'eliminate discretion on the part of the grand jurors,' leaving room for the grand jury to dismiss even if it finds probable cause." Navarro-Vargas II, 408 F.3d at 1205 (quoting United States v. Marcucci, 299 F.3d 1156, 1159 (9th Cir. 2002)). The dissenting opinion notes that the word "should" is used "to express a duty [or] *obligation*." Id. at 1121 (quoting The Oxford American Diction And Language Guide 931 (1999))(emphasis added).[2]

Defendant points to the language in the video where first the son, then the judge, state that if there is a finding of probable cause, the grand jury "will" return an indictment. However, no emphasis is placed on the word "will." As spoken by the actors, the statements are not directives, mandating the return of an indictment upon the finding of probable cause, but, rather, descriptions of what is expected to occur. Similarly, the foreperson's statement that one of the purposes of the grand jury is to bring an accused to trial when there is a finding of probable cause is a general statement of the grand jury's function, not a command to return an indictment in *every* case where probable cause exists.

Defendant also argues that Judge Burns improperly forbade the grand jury from considering the potential punishment for crimes when deciding whether or not to indict. Defendant relies on the following statement:

> Well, those things – the consequences of your determination shouldn't concern you in the sense that penalties or punishment, things like that – we tell trial jurors, of course, that they cannot consider the punishment or the consequence that Congress has set for these things. *We'd ask you to also abide by that.* We want you to make a business-like decision and look at the facts and make a determination of whether there was a probable cause.

App. 2 to Gov't Response at 25. (Emphasis added.) Although Judge Burns stated that trial jurors *cannot* consider punishment, he did not impose such a restriction on the grand jurors. Instead, Judge Burns *requested* that the grand jurors follow the same principle. Similarly, during the formal charge, Judge Burns stated, "[y]ou *shouldn't* be concerned with punishment that attaches to the charge." App. 1 to Gov't Response at 8. (Emphasis added.)

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[2] Defendant concedes that at other times Judge Burns instructed that upon a finding of probable cause, the case "should" go forward. App. 2 to Gov't Response at 8, 17; App. 1 to Gov't Response at 4, 23.

In United States v. Cortez-Rivera, 454 F.3d 1038 (9th Cir. 2006), the Ninth Circuit upheld a jury instruction that stated: "[W]hen deciding whether or not to indict, you *should not* be concerned about punishment in the event of conviction; judges alone determine punishment." (Emphasis added.) Consistent with the reasoning in Marcucci and Navarro-Vargas II, the Ninth Circuit held that the instruction did not place an absolute bar on considering punishment and was therefore constitutional. The instructions given by Judge Burns regarding the consideration of punishment were substantially the same as the instruction in Cortez-Rivera.

Neither Judge Burns nor the video pronounced a general prohibition against jurors exercising their discretion to refuse to return an indictment in the face of probable cause. In any case, "history demonstrates that grand juries do not derive their independence from a judge's instruction. Instead they derive their independence from an unreviewable power to decide whether to indict or not." Navarro-Vargas II, 408 F.3d at 1204.

Both the video and Judge Burns informed the jurors about the utmost secrecy of the grand jury proceedings and their deliberations. The video and Judge Burns also emphasized to the jury that they were independent of the Government and did not have to return an indictment just because the Assistant U.S. Attorney asked them to. In the video, the judge expressed approval at the fact that the grand jury did not return an indictment as to the alleged driver of the get-away car. Judge Burns characterized the jury as "a buffer between our Government's ability to accuse someone of a crime and then putting that person through the burden of standing trial." App. 1 to Gov't Response at 26. Judge Burns also told the jurors that they were not to be a "rubber stamp" and were expected to depend on their independent judgment. Id, at 27.

Even though the jurors were not explicitly instructed that they could use their discretion to refuse to return an indictment, they retained that power by virtue of the secrecy surrounding their deliberations and the unreviewability of their decisions. Nothing that Judge

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Burns said or did impinged on the jurors' independence in this regard.

Defendant counters that the dismissal of the two potential jurors undermined the grand jury's independence from the very start. According to Defendant, when Judge Burns dismissed the jurors, the message was clear that they were to indict in every case where there was probable cause or they would be excused. Defendant contends that the remaining grand jurors could not have understood Judge Burns' actions in any other way. (Reply Br. 18.) The Court disagrees.

Upon reading the voir dire transcript, it is apparent that the jurors were excused because they were biased against the government with respect to a whole category of criminal laws, not simply because they were independent-minded and might refuse to return an indictment in a case where probable cause exists. Judge Burns explained to the clinical social worker, "We're all products of our experience. We're not going to try to disabuse you of experiences or judgments that you have. What we ask is that you not allow those to control invariably the outcome of the cases coming in front of you; that you look at the cases fresh, you evaluate the circumstances, listen to the witness testimony, and then make an independent judgment." App. 2 to Gov't Response at 15. Judge Burns excused the social worker after he admitted that it would be difficult for him to return an indictment in drug or immigration cases.

Similarly, the real estate agent expressed that he thought drugs should be legal and that people using drugs should not be sent to jail. App. 2 to Gov't Response at 25-26. The real estate agent said that he was not comfortable with indicting in drug cases. Although he did not say that he would refuse to indict in all cases involving drugs, he admitted that because of his beliefs, there was a chance that he would refuse to return an indictment in a drug case even though there was probable cause. Id. at 27. The real estate agent's responses established that he had serious concerns regarding the criminalization of drugs and could not be impartial with respect to these cases

That bias was the reason for the dismissal of the first two potential jurors is confirmed by the dismissal of a third potential juror. This juror stated that he had a strong bias for the

Government. App. 2 to Gov't Response at 38. Judge Burns cautioned the juror that he should not "automatically defer to [the Government] or surrender the function and give the indictment decision to the U.S. Attorney. You have to make that independently." Id. at 40. Judge Burns emphasized once again the responsibility of the jurors to evaluate the facts of each case independently based on the evidence presented. Id. at 42-43. Demonstrating his even-handedness, Judge Burns explained, "I'm equally concerned with somebody who would say, 'I'm going to automatically drop the trap door on anybody the U.S. Attorney asks.' I wouldn't want you to do that." Id. at 44.

A reasonable grand juror would not have interpreted the dismissal of the first two potential jurors as a message that they must indict in all cases where probable cause is found or risk being excused from service. It was apparent to the other jurors that a lack of impartiality with respect to certain types of cases, *not* independence, was the reason for all three dismissals.

In sum, Judge Burns did not err in instructing the grand jurors that they were not to refuse to return an indictment on the ground that they disagreed with the laws. Furthermore, nothing in the video or Judge Burns' instructions nullified the grand jury's inherent power to refuse to indict for any reason whatsoever. As the Ninth Circuit noted in Navarro-Vargas II, 408 F.3d at 1204, the grand jury's independence results from the secrecy of their deliberations and the unreviewability of their decisions. Nothing in the record shows any impediment to that independence.

B. Instructions re: Assistant U.S. Attorneys

Defendant also contends that Judge Burns committed structural error by making comments about the Assistant U.S. Attorney's duty to present evidence that "cuts against the charge." According to Defendant, not only did Judge Burns' comments contradict United States v. Williams, 504 U.S. 36 (1992), but also discouraged independent investigation, leading to inaccurate probable cause determinations. Defendant reasons that given Judge Burns' comments, the grand jurors would have assumed that if the prosecutor did not present any exculpatory evidence, then none exists, rendering further investigation a waste of time.

Under Williams, prosecutors do not have a duty to present substantial exculpatory evidence to the grand jury. Although Assistant U.S. Attorneys apparently have an employment duty to disclose “substantial evidence that directly negates the guilt” of a subject of investigation (United States Attorneys’ Manual § 9-11.233), it does not appear that they have a broad duty to disclose all evidence that may be deemed exculpatory or adverse to the Government’s position.

Accordingly, Judge Burns’ comments regarding the duty of Assistant U.S. Attorneys to present adverse evidence were inaccurate. However, Judge Burns’ comments do not rise to the level of structural error. As discussed above, the video and Judge Burns stressed that the grand jury was independent of the Government. The video and Judge Burns also explained to the jury that they could direct the Assistant U.S. Attorney to subpoena additional documents or witnesses. App. 1 to Gov’t Response at 11, 24. The jurors were also told about their right to pursue their own investigation, even if the Assistant U.S. Attorney disagrees with the grand jury’s decision to pursue the subject. Id. at 12.

In light of the foregoing instructions, the Court does not agree that the grand jurors would assume that if the Government did not present any exculpatory evidence, none exists. A reasonable juror would understand that the Assistant U.S. Attorney may not be aware of certain exculpatory evidence, whether due to legitimate circumstances or inadequate investigation, and that further investigation by the grand jury may be needed to properly evaluate the evidence before them. Furthermore, Judge Burns told the jury that “in *most* instances” the U.S. Attorneys are duty-bound to present exculpatory evidence. App. 1 to Gov’t Response at 20. Based on this qualifying language, the grand jurors would have understood that the prosecutor is not always bound to present exculpatory evidence. Thus, “the structural protections of the grand jury” have not “been so compromised as to render the proceedings fundamentally unfair.” Bank of Nova Scotia v. United States, 487 U.S. 250, 257 (1988).

If Defendant can establish that the Government in fact knew of exculpatory evidence that was not presented to the grand jury and that this failure to present exculpatory evidence, in conjunction with Judge Burns' comments, "substantially influenced the grand jury's decision to indict" or raises "grave doubt" that the decision to indict was free from the substantial influence of such events, the Court may dismiss the indictment under its supervisory powers. Bank of Nova Scotia, 487 U.S. at 256. Therefore, the Court will grant Defendant leave to conduct discovery regarding what evidence was presented to the grand jury. If, based upon the discovery, Defendant can establish that he suffered actual prejudice, Defendant may renew his motion to dismiss the indictment.

IV. CONCLUSION

For the reasons discussed above, Defendant's Motion to Dismiss the Indictment Due to Erroneous Grand Jury Instruction is **DENIED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

DATED: October 11, 2007

Honorable Barry Ted Moskowitz
United States District Judge

APPENDIX 4

Judge Houston Amended Order

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. DIANA JIMENEZ-BERMUDEZ, Defendant.	CASE NO. 07cr1372 JAH **AMENDED ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE INDICTMENT**

Defendant Diana Jimenez-Bermudez has filed a Motion to Dismiss the Indictment Due to Erroneous Grand Jury Instruction. For the reasons discussed below, Defendant's motion is **DENIED**.

I. BACKGROUND

On February 28, 2007, a federal grand jury empaneled in this district on January 11, 2007 returned a two-count Indictment charging Defendant with Importation of Methamphetamine, in violation of 21 U.S.C. §§ 952 and 960, and Possession of Methamphetamine with Intent to Distribute, in violation of 21 U.S.C. § 841(a)(1).

II. CHALLENGED INSTRUCTIONS[1]

A. Voir Dire Session

Before commencing voir dire, the empaneling judge, the Hon. Larry A. Burns, explained the function of the grand jury to the prospective jurors as follows: "The grand

[1] In her reply brief, Defendant makes a passing reference to the fact that the grand jurors were shown a video presentation on the role of the grand jury, however there is no substantive challenge to the use of the video, and thus use of the video will not be discussed in depth herein.

jury is determining really two factors: 'Do we have a reasonable – collectively, do we have a reasonable belief that a crime was committed? And second, do we have a reasonable belief that the person that they propose that we indict committed the crime?' If the answer is 'yes' to both of those, then the case should move forward. If the answer to either of the questions is 'no,' then the grand jury should hesitate and not indict." App. 2 to Gov't Response at 8.

During voir dire, Judge Burns explained to the potential grand jurors that the presentation of the evidence to the grand jury was going to be one-sided. Id. at 14. However, Judge Burns stated, "Now, having told you that, my experience is that the prosecutors don't play hide-the-ball. If there's something adverse or that cuts against the charge, you'll be informed of that. They have a duty to do that." Id. at 14-15.

One prospective juror, a retired clinical social worker, indicated that he did not believe that any drugs should be considered illegal. Id. at 16. He also stated that he had strong feelings about immigration cases and thought the government was spending a lot of time unnecessarily persecuting people. Id. The following exchange occurred:

> The Court: Now, the question is can you fairly evaluate those cases? Just as the Defendant ultimately is entitled to a fair trial and the person that's accused is entitled to a fair appraisal of the evidence of the case that's in front of you, so, too, is the United States entitled to a fair judgment. If there's probable cause, then the case should go forward. I wouldn't want you to say, "Well, yeah, there's probable cause. But I still don't like what our Government is doing. I disagree with these laws, so I"m not going to vote for it to go forward." If that's your frame of mind, then probably you shouldn't serve. Only you can tell me that.
>
> Prospective Juror: Well, I think I may fall in that category.
>
> The Court: In the latter category?
>
> Prospective Juror: Yes.
>
> The Court: Where it would be difficult for you to support a charge even if you thought the evidence warranted it?
>
> Prospective Juror: Yes.
>
> The Court: I'm going to excuse you, then. I appreciate your honest answers.

Id. at 16-17.

Later, another prospective juror, a real estate agent, expressed a concern regarding

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the disparity between state and federal law with respect to medical marijuana. Judge Burns responded:

> Well, those things – the consequences of your determination shouldn't concern you in the sense that penalties or punishment, things like that – we tell trial jurors, of course, that they cannot consider the punishment or the consequence that Congress has set for these things. We'd ask you to also abide by that. We want you to make a business-like decision and look at the facts and make a determination of whether there was a [sic] probable cause.

Id. at 25.

Subsequently, the prospective juror stated that he felt that drugs should be legal and that rapists and murderers, not people using drugs, should go to jail. Id. at 25-26. The following exchange ensued:

> The Court: I think rapists and murderers ought to go to jail too. It's not for me as a judge to say what the law is. We elect legislators to do that. We're sort of at the end of the pipe on that. We're charged with enforcing the laws that Congress gives us.
>
> I can tell you sometimes I don't agree with some of the legal decisions that are indicated that I have to make. But my alternative is to vote for someone different, vote for someone that supports the policies I support and get the law changed. It's not for me to say, "Well, I don't like it. So I'm not going to follow it here."
>
> You'd have a similar obligation as a grand juror even though you might have to grit your teeth on some cases. Philosophically, if you were a member of congress, you'd vote against, for example, criminalizing marijuana. I don't know if that's it but you'd vote against criminalizing some drugs.
>
> That's not what your prerogative is here. Your prerogative instead is to act like a judge and to say, "All right. This is what I've got to deal with objectively. Does it seem to me that a crime was committed? Yes. Does it seem to me that this person's involved? It does." And then your obligation, if you find those things to be true, would be to vote in favor of the case going forward.
>
> I can understand if you tell me, "Look, I get all that, but I just can't do it or I wouldn't do it." I don't know what your frame of mind is. You have to tell me about that.
>
> Prospective Juror: I'm not comfortable with it.
>
> The Court: Do you think you'd be inclined to let people go on drug cases even though you were convinced there was probable cause they committed a drug offense?
>
> Prospective Juror: It would depend upon the case.
>
> The Court: Is there a chance that you would do that?
>
> Prospective Juror: Yes.
>
> The Court: I appreciate your answers. I'll excuse you at this time.

Id. at 26-28.

Later, a potential juror said that he was "soft" on immigration because he had done volunteer work with immigrants in the field, but that he could be fair and objective. Judge Burns stated: "As you heard me explain earlier to one of the prospective grand jurors, we're not about trying to change people's philosophies and attitudes here. That's not my business. But what I have to insist on is that you follow the law that's given to us by the United States Congress. We enforce the federal laws here." Id. at 61. This juror was not excused.

B. Charge to Impaneled Grand Jury

After the grand jury was impaneled, Judge Burns gave further instructions regarding the responsibilities of the grand jurors.

With respect to the enforcement of federal laws, Judge Burns explained:

> But it's not for you to judge the wisdom of the criminal laws enacted by Congress; that is, whether or not there should be a federal law or should not be a federal law designating certain activity is [sic] criminal is not up to you. That's a judgment that Congress makes.
>
> And if you disagree with that judgment made by Congress, then your option is not to say, 'Well, I'm going to vote against indicting even though I think that the evidence is sufficient' or 'I'm going to vote in favor of [indictment] even though the evidence may be insufficient.' Instead, your obligation is to contact your congressman or advocate for a change in the laws, but not to bring your personal definition of what the law ought to be and try to impose that through applying it in a grand jury setting.
>
> Furthermore, when you're deciding whether to indict or not to indict, you shouldn't be concerned with punishment that attaches to the charge. I think I also alluded to this in the conversation with one gentleman. Judges alone determine punishment. We tell trial juries in criminal cases that they're not to be concerned with the matter of punishment either. Your obligation at the end of the day is to make a business-like decision on facts and apply those facts to the law as it's explained and read to you.

App. 1 to Gov't Response at 8-9.

With respect to exculpatory evidence, Judge Burns stated: "As I told you, in most instances, the U.S. Attorneys are duty-bound to present evidence that cuts against what they may be asking you to do if they're aware of that evidence." Id. at 20. Later, Judge Burns said, "If past experience is any indication of what to expect in the future, then you can expect that the U.S. Attorneys that will appear in front of you will be candid, they'll be honest, that they'll act in good faith in all matters presented to you." Id. at 27.

III. DISCUSSION

A. Instructions Re: Role of Grand Jury

Defendant contends that Judge Burns' instructions and the dismissal of two potential jurors deprived Defendant of the traditional functioning of the Grand Jury. Specifically, Defendant claims that the challenged statements in combination with the dismissal of the two potential jurors "flatly prohibited grand jurors from exercising their constitutional discretion to not indict even if probable cause supports the charge." (Def.'s Reply Br. 8.) Looking at the instructions as a whole, the Court disagrees.

Judge Burns made it clear that the jurors were not to refuse to indict in the face of probable cause *on the ground that they disagreed with Congress's decision to criminalize certain activity*. Judge Burns did not err in doing so. In United States v. Navarro-Vargas, 408 F.3d 1184 (9th Cir. 2005) ("Navarro-Vargas II"), the Ninth Circuit upheld the model grand jury instruction that states: "You cannot judge the wisdom of the criminal laws enacted by Congress, that is, whether or not there should or should not be a federal law designating certain activity as criminal. That is to be determined by Congress and not by you." The majority opinion observed that the instruction was not contrary to any long-standing historical practice surrounding the grand jury and noted that shortly after the adoption of the Bill of Rights, federal judges charged grand juries with a duty to submit to the law and to strictly enforce it. Id. at 1193,1202-03. "We cannot say that the grand jury's power to judge the wisdom of the laws is so firmly established that the district court must either instruct the jury on its power to nullify the laws or remain silent." Id. at 1204.

A prohibition against judging the wisdom of the criminal laws enacted by Congress amounts to the same thing as a prohibition against refusing to indict based on disagreement with the laws. It is true that Judge Burns used stronger language that, viewed in isolation, could be misconstrued as requiring the return of an indictment in *all* cases where probable cause can be found. Particularly troubling is the following statement made to the real estate agent: "Your prerogative instead is to act like a judge and to say, 'All right. This is what I've got to deal with objectively. Does it seem to me that a crime

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was committed? Yes. Does it seem to me that this person's involved? It does.' *And then your obligation*, if you find those things to be true, *would be to vote in favor of the case going forward*." App. 2 to Gov't Response at 26. However, viewed in context, Judge Burns was not mandating the issuance of an indictment in *all* cases where probable cause is found; he was explaining that disagreement with the laws should not be an obstacle to the issuance of an indictment.[2]

Furthermore, the word "obligation" is not materially different than the word "should." In Navarro-Vargas II, the majority opinion held that the model instruction that the jurors "should" indict if they find probable cause does not violate the grand jury's independence. The majority explained, "As a matter of pure semantics, it does not 'eliminate discretion on the part of the grand jurors,' leaving room for the grand jury to dismiss even if it finds probable cause." Navarro-Vargas II, 408 F.3d at 1205 (quoting United States v. Marcucci, 299 F.3d 1156, 1159 (9th Cir. 2002)). The dissenting opinion notes that the word "should" is used "to express a duty [or] *obligation*." Id. at 1121 (quoting The Oxford American Diction And Language Guide 931 (1999)) (emphasis added).[3]

Defendant also argues that Judge Burns improperly forbade the grand jury from considering the potential punishment for crimes when deciding whether or not to indict. Defendant relies on the following statement:

> Well, those things – the consequences of your determination shouldn't concern you in the sense that penalties or punishment, things like that – we tell trial jurors, of course, that they cannot consider the punishment or the

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[2] The Supreme Court has recognized that a grand jury is not required to indict in every case where probable cause exists. In Vasquez v. Hillery, 474 U.S. 254, 263 (1986), the Supreme Court explained: "The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense - all on the basis of the same facts. Moreover, '[t]he grand jury is not bound to indict in every case where a conviction can be obtained.' United States v. Ciambrone, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)."

[3] Defendant concedes that at other times Judge Burns instructed that upon a finding of probable cause, the case "should" go forward. App. 2 to Gov't Response at 8, 17; App. 1 to Gov't Response at 4, 23.

> consequence that Congress has set for these things. *We'd ask you to also abide by that.* We want you to make a business-like decision and look at the facts and make a determination of whether there was a probable cause.

App. 2 to Gov't Response at 25. (Emphasis added.) Although Judge Burns stated that trial jurors *cannot* consider punishment, he did not impose such a restriction on the grand jurors. Instead, Judge Burns *requested* that the grand jurors follow the same principle. Similarly, during the formal charge, Judge Burns stated, "[y]ou *shouldn't* be concerned with punishment that attaches to the charge." App. 1 to Gov't Response at 8. (Emphasis added.)

In United States v. Cortez-Rivera, 454 F.3d 1038 (9th Cir. 2006), the Ninth Circuit upheld a jury instruction that stated: "[W]hen deciding whether or not to indict, you *should not* be concerned about punishment in the event of conviction; judges alone determine punishment." (Emphasis added.) Consistent with the reasoning in Marcucci and Navarro-Vargas II, the Ninth Circuit held that the instruction did not place an absolute bar on considering punishment and was therefore constitutional. The instructions given by Judge Burns regarding the consideration of punishment were substantially the same as the instruction in Cortez-Rivera.

Judge Burns did not pronounce a general prohibition against jurors exercising their discretion to refuse to return an indictment in the face of probable cause. In any case, "history demonstrates that grand juries do not derive their independence from a judge's instruction. Instead they derive their independence from an unreviewable power to decide whether to indict or not." Navarro-Vargas II, 408 F.3d at 1204.

Judge Burns informed the jurors about the utmost secrecy of the grand jury proceedings and their deliberations. In addition, a video shown to the potential grand jurors titled, "The Federal Grand Jury: The People's Panel," which was intended to educate potential grand jurors about their responsibilities as grand jurors, also informed the jurors of the secrecy of the proceedings. Judge Burns and the video also emphasized to the jury that they were independent of the Government and did not have to return an indictment just because the Assistant U.S. Attorney asked them to. Judge Burns characterized the

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jury as "a buffer between our Government's ability to accuse someone of a crime and then putting that person through the burden of standing trial." App. 1 to Gov't Response at 26. Judge Burns also told the jurors that they were not to be a "rubber stamp" and were expected to depend on their independent judgment. Id, at 27.

Even though the jurors were not explicitly instructed that they could use their discretion to refuse to return an indictment, they retained that power by virtue of the secrecy surrounding their deliberations and the unreviewability of their decisions. Nothing that Judge Burns said or did impinged on the jurors' independence in this regard.

Defendant counters that the dismissal of the two potential jurors undermined the grand jury's independence from the very start. According to Defendant, when Judge Burns dismissed the jurors, the message was clear that they were to indict in every case where there was probable cause or they would be excused. Defendant contends that the remaining grand jurors could not have understood Judge Burns' actions in any other way. (Reply Br. 18.) The Court disagrees.

Upon reading the voir dire transcript, it is apparent that the jurors were excused because they were biased against the government with respect to a whole category of criminal laws, not simply because they were independent-minded and might refuse to return an indictment in a case where probable cause exists. Judge Burns explained to the clinical social worker, "We're all products of our experience. We're not going to try to disabuse you of experiences or judgments that you have. What we ask is that you not allow those to control invariably the outcome of the cases coming in front of you; that you look at the cases fresh, you evaluate the circumstances, listen to the witness testimony, and then make an independent judgment." App. 2 to Gov't Response at 15. Judge Burns excused the social worker after he admitted that it would be difficult for him to return an indictment in drug or immigration cases.

Similarly, the real estate agent expressed that he thought drugs should be legal and that people using drugs should not be sent to jail. App. 2 to Gov't Response at 25-26. The real estate agent said that he was not comfortable with indicting in drug cases.

Although he did not say that he would refuse to indict in all cases involving drugs, he admitted that because of his beliefs, there was a chance that he would refuse to return an indictment in a drug case even though there was probable cause. Id. at 27. The real estate agent's responses established that he had serious concerns regarding the criminalization of drugs and could not be impartial with respect to these cases

That bias was the reason for the dismissal of the first two potential jurors is confirmed by the dismissal of a third potential juror. This juror stated that he had a strong bias for the Government. App. 2 to Gov't Response at 38. Judge Burns cautioned the juror that he should not "automatically defer to [the Government] or surrender the function and give the indictment decision to the U.S. Attorney. You have to make that independently." Id. at 40. Judge Burns emphasized once again the responsibility of the jurors to evaluate the facts of each case independently based on the evidence presented. Id. at 42-43. Demonstrating his even-handedness, Judge Burns explained, "I'm equally concerned with somebody who would say, 'I'm going to automatically drop the trap door on anybody the U.S. Attorney asks.' I wouldn't want you to do that." Id. at 44.

A reasonable grand juror would not have interpreted the dismissal of the first two potential jurors as a message that they must indict in all cases where probable cause is found or risk being excused from service. It was apparent to the other jurors that a lack of impartiality with respect to certain types of cases, *not* independence, was the reason for all three dismissals.

In sum, Judge Burns did not err in instructing the grand jurors that they were not to refuse to return an indictment on the ground that they disagreed with the laws. Furthermore, nothing in the video or Judge Burns' instructions nullified the grand jury's inherent power to refuse to indict for any reason whatsoever. As the Ninth Circuit noted in Navarro-Vargas II, 408 F.3d at 1204, the grand jury's independence results from the secrecy of their deliberations and the unreviewability of their decisions. Nothing in the record shows any impediment to that independence.

B. Instructions re: Assistant U.S. Attorneys

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Defendant also contends that Judge Burns committed structural error by making comments about the Assistant U.S. Attorney's duty to present evidence that "cuts against the charge." According to Defendant, not only did Judge Burns' comments contradict United States v. Williams, 504 U.S. 36 (1992), but also discouraged independent investigation, leading to inaccurate probable cause determinations. Defendant reasons that given Judge Burns' comments, the grand jurors would have assumed that if the prosecutor did not present any exculpatory evidence, then none exists, rendering further investigation a waste of time.

Under Williams, prosecutors do not have a duty to present substantial exculpatory evidence to the grand jury. Although Assistant U.S. Attorneys apparently have an employment duty to disclose "substantial evidence that directly negates the guilt" of a subject of investigation (United States Attorneys' Manual § 9-11.233), it does not appear that they have a broad duty to disclose all evidence that may be deemed exculpatory or adverse to the Government's position.

Accordingly, Judge Burns' comments regarding the duty of Assistant U.S. Attorneys to present adverse evidence were inaccurate. However, Judge Burns' comments do not rise to the level of structural error. As discussed above, the video and Judge Burns stressed that the grand jury was independent of the Government. The video and Judge Burns also explained to the jury that they could direct the Assistant U.S. Attorney to subpoena additional documents or witnesses. App. 1 to Gov't Response at 11, 24. The jurors were also told about their right to pursue their own investigation, even if the Assistant U.S. Attorney disagrees with the grand jury's decision to pursue the subject. Id. at 12.

In light of the foregoing instructions, the Court does not agree that the grand jurors would assume that if the Government did not present any exculpatory evidence, none exists. A reasonable juror would understand that the Assistant U.S. Attorney may not be aware of certain exculpatory evidence, whether due to legitimate circumstances or inadequate investigation, and that further investigation by the grand jury may be needed to properly evaluate the evidence before them. Furthermore, Judge Burns told the jury that "in *most* instances" the U.S. Attorneys are duty-bound to present exculpatory evidence. App. 1 to Gov't Response at 20. Based on this qualifying language, the grand jurors would have understood that the prosecutor is not always bound to present exculpatory evidence. Thus, "the structural protections of the grand jury" have not "been so compromised as to render the proceedings fundamentally unfair." Bank of Nova Scotia v. United States, 487 U.S. 250, 257 (1988).

IV. CONCLUSION

For the reasons discussed above, Defendant's Motion to Dismiss the Indictment Due to Erroneous Grand Jury Instruction is **DENIED**.

DATED: December 5, 2007

HON. JOHN A. HOUSTON
United States District Judge

IT IS SO ORDERED.

APPENDIX 5

Order Denying Motion to Dismiss

FILED

2006 MAR -7 PM 3:45

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. DAVID VEGA-GUERRERO, Defendant.	CASE NO. 05CR2069 ORDER DENYING MOTION TO DISMISS INDICTMENT

I. Introduction

Defendant is charged with being a deported alien found in the United States in violation of 8 U.S.C. § 1326. Defendant has filed a motion to dismiss the indictment on the ground that the offense is improperly charged in the disjunctive. For the reasons set forth below, the motion is denied.

II. Analysis

8 U.S.C. § 1326 makes it unlawful for a previously deported alien to be found in the United States without the express consent of the Attorney General of the United States. However, effective March 1, 2003, the Secretary of the Department of Homeland Security became responsible for carrying out immigration enforcement functions. See 6 U.S.C. § 202(3) and 557. Accordingly, the indictment alleges that defendant was found in the United States "without the Attorney General of the United States **or** his designated successor, the Secretary of the Department of Homeland Security . . . having expressly consented . . . ." (emphasis added). Defendant contends that because the indictment uses the disjunctive "or," the indictment impermissibly pleads in the disjunctive.

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A statute that defines an offense in more than one way is written in the disjunctive. See McGriff v. United States, 408 F.2d 333, 334 (9th Cir. 1969) (noting that statute making it a crime to "receive, conceal or retain" stolen goods is an example of a statute written in the disjunctive). The basic rule is that if the statute is written in the disjunctive, it is *permissible* for the indictment to plead in the conjunctive. See United States v. Carter, 454 F.2d 523 (9th Cir. 1972). However, in a dissent, Judge Reinhardt has concluded that if a statute is written in the disjunctive, *i.e.*, "if an offense can be committed in more than one way," then the indictment *must* charge in the conjunctive in order to be sufficient. United States v. Zavala, 839 F.2d 523, 532 (9th Cir. 1988) (Reinhardt. J., dissenting); see also Wright, Federal Practice and Procedure § 125 at 563 ("[T]he pleading may allege commission of the offense by all the acts mentioned if it uses the conjunctive 'and' where the statute uses the disjunctive 'or.' But if the indictment or information alleges the several acts in the disjunctive it fails to inform the defendant which of the acts he is charged with having committed, and it is insufficient.").

As a preliminary matter, the statute on its face is not written in the disjunctive with respect to whose permission must be obtained. Specifically, § 1326 makes it unlawful for a previously-deported alien to be found in the United States "unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission . . . ." Because the statute itself is not written in the disjunctive, the general rule that an indictment must be pled in the conjunctive when the statute is written in the disjunctive appears inapplicable here.

Moreover, in any event, the indictment is not pled in the disjunctive despite the fact that it uses the disjunctive "or" because it does not charge defendant with violating the statute in two different ways. "*An indictment must be read in its entirety and construed in accord with common sense and practicality.*" United States v. Alber, 56 F.3d 1106 (9th Cir. 1995) (citation omitted). As the government notes, a "common sense" reading of the challenged language in the indictment simply "indicates that a previously deported alien must obtain the consent of the appropriate government official (the Attorney General or his designated successor) before re-entering the United States." Government Response at 3:28-4:2. The case of Freeman v. United States, 158 F.2d 891, 894 (9th Cir. 1946) illustrates why the indictment is not pled in the disjunctive.

In Freeman, the information was challenged "because of its use of the disjunctive in the phrase 'without surrendering (the required ration points) to the seller or transferor' of the meat." Id. at 894. The defendant contended that the information should have been pled in the conjunctive rather than the disjunctive. However, the Ninth Circuit rejected the defendant's challenge to the information as being "without merit." Id. As it explained:

> Section 27.1 of Revised Ration Order No. 16 defines 'transfer' as meaning to sell, as well as to transfer in other ways, and, hence, 'seller' and 'transferor' are synonymous under the regulation. **Hence, the allegation is not, in fact, in the disjunctive.**

Id. (emphasis added). Here, "Attorney General" and "Secretary of the Department of Homeland Security" are synonymous for all relevant purposes given that the Secretary of the Department of Homeland Security is the successor of the Attorney General. Thus, the allegation in the indictment "is not, in fact, [pled] in the disjunctive" despite the use of the disjunctive "or." Id.

Finally, it should be noted that if the word "and" were to be substituted for the word "or," the indictment would read "defendant . . . was found in the United States, without the Attorney General of the United States and his designated successor, the Secretary of the Department of Homeland Security . . . having expressly consented to the defendant's reapplication for admission . . . ." A grand jury could return such an indictment if it found that the defendant obtained the permission of the Attorney General but not the Secretary of the Department of Homeland Security. Yet clearly the return of an indictment under such circumstances would be contrary to the plain language and intent of the statute.

Defendant also argues that the indictment is insufficient because it fails to distinguish between the time periods during which the Attorney General enforced the immigration laws and the time periods during which the Secretary of the Department of Homeland Security was responsible for their enforcement. For an indictment to be sufficient, it "must state the elements of the offense charged with sufficient clarity to apprise a defendant of the charge against which he must defend and to enable him to plead double jeopardy." United States v. Hinton, 222 F.3d 664, 672 (9th Cir. 2000). The time period during which the Attorney General and the Secretary of the Department of Homeland Security were charged with the enforcement of the immigration laws is not an element of § 1326 and therefore need not be pled in the indictment.

III. Conclusion

For these reasons, defendant's motion to dismiss the indictment for failure to properly plead the elements of the crime is denied.

IT IS SO ORDERED.

DATED: 3/7/06 ,2006

JOHN S. RHOADES, SR.
United States District Judge

cc: All parties